85-1856

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM. 1985

JAYCO SYSTEMS, INC.,

Petitioner,

v.

SAVIN BUSINESS MACHINES CORPORATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied a new Rule 56 standard in determining that the Petitioner did not have antitrust standing to challenge an admitted governmental bid-rigging. (15 U.S.C. §1).

2. Whether the Court of Appeals properly applied a new Rule 56 standard in determining that the unique Statewide purchasing procedures for photocopiers and supplies by the many State of Texas independent agencies, respectively, did not constitute a relevant submarket for antitrust analysis. (15 U.S.C. §§1,2).

3. Whether the Court of Appeals erred in determining that the rule of reason rather

than the per se rule applied in circumstances involving bid-rigging, price-fixing and agreements not to compete for Texas governmental copier business by a combination involving: (1) copier dealers, some of whom otherwise competed in the copier market; (2) the supplier Savin Corporation; and (3) State of Texas officials. (15 U.S.C. §1).

4. Whether the Court of Appeals properly applied a new Rule 56 standard in failing to render Summary Judgment on antitrust claims for the Petitioner in view of: (1) undisputed admissions by conspirators of their personal participation in the bid-rigging; (2) undisputed interest and uncontroverted preparedness on the part of the Plaintiff to participate in bidding for

the Texas state governmental convenience copier or supply business; (3) uncontroverted expert opinion on the extent of damages incurred by the Petitioner as a result of the bid-rigging by the Savin Corporation and others in conspiracy with it. (15 U.S.C. §1,2).

PARTIES BELOW

In the Court below, the Petitioner, Jayco Systems, Inc. was Appellant. The Respondent, Savin Business Machines Corporation, was Appellee.

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No.

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OCTOBER TERM, 1985

JAYCO SYSTEMS, INC.,

Petitioner,

v.

SAVIN BUSINESS MACHINES CORPORATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Jayco Systems, Inc. (hereinafter "Jayco") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND JUDGMENT BELOW

The Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing En Banc on January 29, 1986. The Court of Appeals decision was rendered on November 29, 1985. The Final Judgment of the District Court was rendered on July 6, 1984.[1]

JURISDICTION

The Order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc was entered on January 29, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

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[1]Ex. A, B, C. [All references herein to supporting documentation in the Appendix shall be cited as: Ex. '___'.]

United States Code, Title 15

Monopolies And Combinations In Restraint Of Trade, 15 U.S.C. §§1,2.

15 U.S.C. §1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal...."

15 U.S.C. §2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the States or with foreign nations...."

Rule 56, Federal Rules of Civil Procedure

* * *

"(c) Motion and Proceedings Thereon....the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...

* * *

(e) Form of Affidavits; Further Testimony; Defense Required...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

STATEMENT OF THE CASE

This is a blatant bid-rigging case involving the sale and rental of convenience copiers and supplies to the many State of Texas agencies located throughout the State of Texas.[2]

Savin Business Machines Corporation, now known as Savin Corporation (hereinafter "Savin"), is a nationwide supplier of photocopiers, parts and supplies. It operates as a wholesaler to its independent Savin dealers. Savin retails: (1) to many major accounts; and (2) through its local branch operations. Savin's sales to independent Savin dealers, such as Jayco, are for resale, rental or

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[2]Other issues concerning the parties' common law claims have been resolved through a compromise and they are no longer a part of this litigation.

leasing to end users. The sale or rental of Savin copiers and supplies to the various State of Texas agencies involved Savin's role as both retailer and wholesaler.

The State of Texas through its State Purchasing Commission (hereinafter "SPC") monitors the pricing of goods and services through competitive bidding procedures. The SPC procedures strive to provide various goods and services at the lowest consumer costs. The various State agencies should be able to rely on the SPC procedures to provide them with "the most for their money." Nonetheless, the various agencies, respectively, through rules and regulations, retain the right to exercise independent purchasing discretion, whether the desired supplier is

"on the contract" or "off the contract."[3]

Each State of Texas governmental agency acquires goods and services through the SPC in two (2) ways. First, the particular agency may elect to acquire "a contract" good or service. If so, the agency need only contact the SPC for that particular good or service. Second, the agency may also seek goods or services through an "open market" request. In such an event, the SPC requests bids from those vendors on its bid list and the lowest bid satisfying the bid specifications is supposed to be awarded the contract. Thus, the State of Texas copier business consists of the acquisition or rentals of either copiers

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[3]Ex. D at 45-48; Ex. E at 29-30.

or supplies under: (1) the annual contract; or (2) the "open market" requests.

The bidders for the State of Texas annual contracts or "open market" requests must follow very rigid vendor requirements in this special market. General retail suppliers are rarely on the active bid list and are not a factor in this submarket. Vendors for State of Texas business must request to be placed on the bid list. Thereafter, they must periodically submit bids in order to remain on the active list. Vendors must respond to bids with conforming equipment. Bid winners are often required to post performance bonds to assure contract performance. Only a handful of potential vendors in the State of Texas have ever bid for these governmental

copier contracts, reflecting the restrictive nature of the submarket.

A vendor's success on an annual machine rental bid is very dependent upon the correlative bid for copier supplies. Awards are made on the basis of the "lowest cost per copy" formula which incorporates the cost of copier supplies with the copier rental bid.

On the other hand, "open market" bid requests may be issued for either, or both, the copier and supplies. Such an "open market" bid contemplates a single transaction.

It is critical to understand that the SPC, although processing and evaluating contract bids, does <u>not</u> purchase copier

equipment or supplies for the individual agencies. Each individual agency has its own budget, and exercises its own purchasing discretion. The SPC simply provides a centralized bidding procedure. The Court of Appeals appeared to misunderstand the role of the SPC. The State of Texas governmental copier market is not a single purchaser. Instead, it consists of many individual agency purchasers.

Immediately after being appointed as an independent Savin dealer in late 1974, Jayco evidenced its interest and ability to participate in the State of Texas copier business by being placed upon the SPC bid list. Jayco thereafter submitted bids for both: (1) the annual convenience copier rental

contracts; and (2) "open market" bid requests.[4]

In 1975, Jayco was the only Savin dealer to bid the Savin bond copier for the annual copier rental contracts. Jayco bid the unmerchantable, unreliable Model 300,[5] as the Model 750 was not available for the 1975 bid.

By mid-1975, however, Jayco was successful in obtaining an "open market" contract award for approximately $200,000.00 of copiers to be placed throughout the State of Texas. Jayco successfully placed the machi-

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[4]Ex. F at 47-52; Ex. G at 7-11; Ex. H at 28-31, 44.

[5]The Court of Appeals recognized the Model 300 as the copier industry's version of the Edsel. Jayco Systems v. Savin Business Machines Corp., 777 F.2d 306, 308 (5th Cir. 1985); See Ex. G at 3-6; Ex. F at 51-52.

nes and established copier service locations where necessary. Jayco did not bid Savin copiers because bid specifications required that the particular copier accommodate "11 x 17" documents.[6]

In 1975, Jayco also determined that it should bid the new, revolutionary Model 750 for the 1976 annual copier rental bids. Savin initially committed to support Jayco's bidding plans. Without explanation, however, Savin turned inexplicably cold over the next several months.[7] Thereafter, Jayco was told that Savin would not commit sufficient Model

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[6]Ex. J at 4-5 (Model 300's incompatible)

[7]Ex. F at 52-54, 82; Ex. I at 3-5; Ex. J at 3-6.

750 machines to support a Jayco bid.[8]

With Jayco eliminated from the bidding process, Savin did submit a bid on the annual copier rental contracts in June of 1976. That bid was accomplished through a non-competition combination with various Savin dealers and State of Texas officials.[9] In that regard, Savin management personnel testified that independent Savin dealers were admonished not to "rock the boat." More specifically, any independent Savin dealer who dared to compete, was threatened with immediate termination. Specific instances were related by Savin personnel.[10]

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[8]See note 7 supra.

[9]Ex. G at 7-11; Ex. I at 11-14; Ex. K at 2-27; Ex. L at 3-9; Ex. M at 4-19.

[10]Ex. N at 31-34; Ex. L at 4-8, 11-12; Ex. K at 10-11, 16-18, 22, 25-26; Ex. M at 10-11.

Jayco was also precluded from bidding for the "open market" bid requests, because of the same threats of termination. A former Savin manager reported that an El Paso Savin dealer tried to bid Savin copiers on an "open market" bid. The former Savin District Manager admitted traveling to the dealer's location and threatening the independent dealer with termination solely because of making a bid submission.[11] The witness told the El Paso dealer that if he did it again, Savin would "cut his n_ts off."[12] A more pernicious economic policy is difficult to fathom.

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[11]Ex. N 31-34; Ex. See Note 10 supra.

[12]Ex. N at 34.

Because of the threats and the exclusionary conduct of the Savin group, Jayco was unable to bid for either the annual copier rental contracts or the "open market" bid request in 1976.[13]

The absence of meaningful interbrand competition in the Texas State governmental copier business casts greater light on the nature of the restraints imposed. According to Savin witnesses, Savin dealers, and the Savin State of Texas Contract Manager, there was no effective competition for the Savin Model 750 in 1976 or for several years thereafter. According to witnesses, the only real competition for the Savin Model 700

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[13]Ex. G at 5-6.

Series was between Savin dealers or the Savin Corporation.[14]

The Model 750 was a low-cost, reliable and dependable convenience copier with which no other make could compete. Savin witnesses and the leading market research authorities, such as Data Quest, identified Savin as number one (1) in the country by 1978-79 in copier placements, outplacing I.B.M. and Xerox combined, as a result of the revolutionary Model 750. [15]

The Court of Appeals erroneously inferred that Data Quest was a mere advertisement.

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[14]Ex. K at 4, 17-25; Ex. L at 17-18; Ex. P at 102-05.

[15]Ex. L at 17-18; Ex. P at 103-05.

Jayco Systems, supra at 309, 309-310 n.7 It is not. Data Quest is a leading copier industry market research resource. Thus, a Data Quest confirmation of Savin's market power is significant, indeed.

Savin dominated the State of Texas governmental business, just as it dominated the rest of the country. The Court below, however, was preoccupied with the "fate" of Savin's competitors.[16] The demise of interbrand competition is simply explained by the unparalleled success of Savin's Model 750 and the "assistance" of some State of Texas officials. Savin extended that copier market dominance to the control of many independent Savin dealers who otherwise competed.[17]

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[16]Jayco Systems, supra at 320 n.48.

[17]Savin Dealers continued to compete on

Savin's State of Texas copier business Contract Manager, Ms. Mary Wilson, testified that the union of Savin's product dominance, dealer restraints and its abnormally close relationships with some State officials, enabled Ms. Wilson to successfully submit bids for as much as twice the price of the same equipment available in the general retail market. Incredibly, Ms. Wilson testified that she nonetheless prevailed on not less than 95% of the "open market" bids in this special submarket.[18]

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other State of Texas business which posed no conflict with the controlled annual rental and open market convenience copier bid contracts. Ex. L at 7 (otherwise, fierce competitors).

[18] Ex. M at 19-20.

Jayco was not the only loser in this submarket. The taxpayers of the State of Texas were cheated each time that the Savin conspiracy received supracompetitive prices for copiers and supplies. The antitrust laws were enacted to prevent the success of such concerted, illicit market manipulations.

REASONS FOR GRANTING THE WRIT

I.

The Decision Of The Court Of Appeals For The Fifth Circuit Implemented A New Rule 56 Standard In Conflict With Matsushita Elec. Indus. Co. v. Zenith Radio, ____ U.S. ____, 106 S.Ct. 1348, ___ L.Ed.2d ___ (1986); First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); Poller v. CBS, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

The Court of Appeals recited well-established standards for reviewing a motion for summary judgment. The Court noted that the pleadings and accompanying evidentiary materials must be viewed in the light most favorable to the non-moving party, Jayco. Jayco Systems, supra at 308-09. Nonetheless, the Court chose to view disputed material facts in the light most favorable to the movant, Savin.

The unjust result of the Court's failure to follow its own standards resulted in rewarding an unabashed antitrust conspiracy. The Court of Appeals erred because of its failure to adhere to the guidance provided in First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 20

L.Ed.2d 569 (1968). The Supreme Court in the First National Bank of Arizona case recognized that the antitrust plaintiff could not rely merely on its pleadings in the face of sworn denials and evidence which constituted a "properly supported summary judgment motion." Id. at 1592-93.

Critically, the Rule 56 standard shifts the burden of producing evidence to the non-movant only after the movant conclusively demonstrates the facts upon which it relies. Id. at 1593. Once the movant has conclusively demonstrated the existence of certain facts which reject the complaint's allegations, it is only then that the non-movant must present "any significant probative evidence to defeat the motion." Id.

In the Fifth Circuit, past panels have held that the non-movant need only "offer evidence that goes beyond unsupported conjecture." Walker v. U-Haul Co. of Miss., 734 F.2d 1068, 1072 (5th Cir. 1984); accord, Parsons v. Ford Motor Co., 669 F.2d 308, 313 (5th Cir.), cert. denied, 458 U.S. 832, 103 S.Ct. 73, ___ L.Ed.2d ___ (1982). In spite of that reasonable threshold, the Court of Appeals in this case ignored its own standards: (1) it weighed questions of fact; (2) it made factual determinations; (3) it rejected unchallenged summary judgment evidence; and (4) it overlooked its duty to view the summary judgment record in the light most favorable to the non-movant, Jayco. The Fifth Circuit acted contrary to its own established dogma that Courts must not

resolve factual disputes on summary judgment which rightfully belong in the province of the jury. See Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980).

Finally, this is not a case in which the Court of Appeals has questioned the existence of an antitrust conspiracy. To the contrary, the Court below noted that the facts presented "a fertile field to hoe." Jayco Systems, supra at 308. Respectfully, the Court of Appeals never found the forest, because it embarked upon erroneous procedural trails.

A.

The Court Of Appeals Improperly Applied A New Rule 56 Standard In Determining That Jayco Did Not Have Antitrust Standing To Challenge An Admitted Governmental Bid-Rigging.

The Court of Appeals conceded that Jayco's claimed injuries, if any, were "antitrust injuries." Jayco Systems, supra at 313. Nonetheless, the Court of Appeals rejected, in general, Jayco's §1 claims on the basis of standing.

The Court held that Jayco had to demonstrate: (1) that it intended to bid on the State copier contracts; and (2) that it was prepared to bid on the contracts. The Court rejected Jayco's claims on the basis that Jayco "[f]ailed to show that it was able and prepared to obtain financing in 1976." Id. at 315-16. In order to reach its conclusion, the Court resorted to bizarre evidentiary gymnastics.

First, as to the "financial preparedness"

issue, the Fifth Circuit discussed only the statewide annual rental copier contracts. Specifically, the Court did not deny Jayco's standing to pursue relief for damages in the "open market" rental or sale of copiers and supplies. Id. at 314. It states that Jayco demonstrated such standing. Inexplicably the Court ignored that fact in regard to "open-market" sales in order to reach its inconsistent conclusion that, generally, Jayco lacked standing.[19]

Second, in rejecting Jayco's standing, it improperly spurned the expert opinion of Ms. Colleen Collins, a former Senior Vice-President of Mercantile Dallas Bank (now,

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[19]The Court does, however, deny Jayco's standing to challenge restraints on the annual supply bid, only. Yet, Jayco did not bid solely because of Savin's threats. Ex. G at 8-10; Ex. I at 11-14; supra 14-17.

"MBank"). The Court acknowledged her opinion that Jayco was financially prepared, but ruled it was not "significant evidence."

The Court of Appeals attacked Ms. Collins' opinion that she would have extended the necessary credit to Jayco Systems on the following basis:

> (1) No evidence that Ms. Collins considered the likelihood of copier placements;
>
> (2) No evidence that Ms. Collins considered the "return policy" of copiers on the State Contract;
>
> (3) That Ms. Collins must not have considered Jayco's repayment history with Canon or Savin which had been described as "good" and "generally satisfactory," respectively, in reaching her opinion that Jayco's and the Woznick's creditworthiness was "excellent;" and,
>
> (4) On the Court's speculation that the profitable history of the contract rested "in all probability on Savin's own effort."

Jayco Systems, supra at 315.

The Fifth Circuit, indeed, indulged inferences. However, it established a new standard of indulging inferences in favor of the movant, the wrong party. Ms. Collins' expert opinion was further criticized because Savin failed to subject her opinion to cross-examination. Id. at 315. It is preposterous that the movant in a summary judgment motion should be rewarded for not deposing the non-movant's expert. Yet, the Fifth Circuit blessed Savin with favorable inferences for not deposing Ms. Collins.

While the Court of Appeals improperly speculated on Ms. Collins' opinion, she expressly testified that:

(1) Ms. Collins received her M.B.A. from Columbia University in New York City;

(2) Ms. Collins thereafter performed executive banking functions at Citicorp in New York and MBank in Dallas where she served as the Chairman of the Private Banking Loan Committee;

(3) In evaluating Jayco, Ms. Collins personally conferred with Mr. Woznick and Jayco's banker from the First National Bank of Dallas (now, InterFirst Bank);

(4) Ms. Collins reviewed profitability and financial summaries specially prepared by Touche, Ross & Co., a Big-Eight accounting firm. The data utilized by Touche, Ross & Co. reflected the revenues and placements from Savin's own records;

(5) Ms. Collins also reviewed Jayco's actual costs ratios in its day-to-day business, as well as other financial statements which she deemed material;

(6) Ms. Collins reviewed Jayco's payment record to the First National Bank and its credit exposure in other regards;

(7) Finally, Ms. Collins evaluated the State of Texas contracts, records

> and financial requirements necessary to underwrite the State of Texas copier business.[20]

Ms. Collins' opinion, based upon her banking expertise and detailed factual investigation, was that any competent banker would have granted Jayco the financing it needed in order to undertake the business. In sum, Ms. Collins considered them to be excellent banking prospects.[21]

Ms. Collins presented the Court with a well-reasoned expert opinion, based upon reliable factual data. Yet, the Fifth Circuit rejected her unchallenged opinion in favor of the Panel's own speculation.

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[20] Ex. Q at 1-9.

[21] Note 20 supra.

The Court of Appeals also placed unreasonable reliance on Mr. Woznick's refusal to join the conspiracy. Rather than demonstrating a lack of "preparedness," Jayco's refusal reveals some understanding of commercial morality.

The additional reference of the Court to a July, 1976 complaint letter to Savin seriously misconstrued the nature of the communication and its context.[22] In fact, it appears that the Court of Appeals merely "lifted" the editorialized quotation from the Brief of the Appellee below.

The Fifth Circuit quoted a misleading

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[22] Ex. R.

portion of an entire thought. The Court misstated that in July, 1976, Woznick had written Savin that Jayco:

> "...was not in a position to rent 750 copiers--even if [it] were able to obtain ample machines."

Jayco Systems, supra at 314.

Unfairly, the entire sentence is not reflected as it appeared in Mr. Woznick's letter. Specifically, the entire sentence is as follows:

> "...[Jayco is] not in a position to rent 750 copiers-even if we were able to obtain ample machines-especially on a rental program for less than the 300 bond!"

Moreover, the letter's initial paragraph makes evident that Jayco did want additional machines:

> "[w]e have had many adversities to overcome, including the obtaining of sufficient Savin 750's...."

Mr. Woznick continues:

> "...our commitment to Savin becomes more insurmountable when we consider competition from the branch itself, as well as the new dealers who need only to operate their business with the new 750 copiers and not fight the perils of the Savin 300 program."

Mr. Woznick emphasizes his complaint about Savin's lack of integrity for breaching a non-competition agreement for which Jayco had already paid $50,000.00. Jayco's obvious complaint concerned Savin's breaches of its non-competition covenant and the unmerchantable Model 300. Mr. Woznick's letter should also be measured against his unequivocal testimony:

> "Jayco was a profitable business enterprise in every aspect except for the Savin 300 Series, which

> were not profitable for anyone... Jayco was a going concern, had good credit, and was seeking a dependable and reliable copier which could be obtained in order to bid for a large rental fleet business."[23]

Mr. Woznick's testimony is consistent with Ms. Colleen Collins' expert opinion.

An even more egregious example of the Court's capriciousness is its misplaced reliance on the deposition of Mr. Bishop, a lower level RepublicBank lending officer. The Court embraces Mr. Bishop's non-expert testimony regarding Jayco's financial preparedness, despite critical testimonial deficiencies:

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[23]Ex. G at 12-13.

(1) Savin disavowed Mr. Bishop as its expert witness;[24]

(2) Bishop had no knowledge of the State of Texas contract business;

(3) Bishop never ran a credit check on the Woznicks or Jayco;

(4) Bishop did not consider Woznick's guarantee or credit status;

(5) Bishop knew nothing about Jayco or the Woznicks.[25]

It is wrong that the Court of Appeals rejected as totally unmeritorious, the opinion of Ms. Collins, an expert with first-hand knowledge of the parties, the market and the financial requirements for the specific contracts. On the other hand, it is stulti-

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[24]Ex. S at 68 (District Court summary judgment hearing)(Savin disavows Bishop as its expert).

[25]Ex. T at 41-44, 48-49, 59-60, 66.

fying that the Court welcomed the unconsidered comments of a banker: (1) who had a lesser posture and authority; (2) who had no first-hand information; and (3) who had not reviewed any of the relevant documentation.

The Court also "holds" that Jayco never approached anyone about financing the purchase of the necessary machines. Jayco Systems, supra at 315. This "holding" ignores the following uncontroverted facts:

> (1) Jayco had approached Savin about obtaining an assurance of machine availability;
>
> (2) Mr. Woznick testified that he never communicated with any representative of Republic National Bank regarding the copier business;
>
> (3) Jayco had been a profitable business enterprise in every respect except for the unmerchantable Model 300's;
>
> (4) Jayco had a good credit rating;

(3) Jayco had been a profitable business enterprise in every respect except for the unmerchantable Model 300's;

(4) Jayco had a good credit rating;

(5) Jayco had begun planning with its banker to acquire a dependable and reliable copier in order to bid for a large rental fleet; and,

(6) Jayco sold many of its assets, less obligations, for several hundred thousand dollars in January of 1981.[26]

Those facts reveal a business which was financially able to undertake the State business. Critically, the State never questioned Jayco's financial preparedness.[27]

Finally, Jayco's failure to submit a bid did not reflect a lack of preparedness.

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[26]Ex. G; I; Ex. Q.

[27]Ex. E at 27, 39.

Rather, testimony reveals that the failure resulted from: (1) Savin's refusal to supply the machines; (2) Savin's threats of termination; and (3) an absence of competitive copiers.[28]

The Court of Appeals cannot expect Jayco to submit a bid which Jayco knew that it could not fulfill without an available copier supply. The Court's speculative position is inconsistent with business practices and summary judgment standards.

The errors of the Court of Appeals are clearly erroneous and resulted in an improper and an unfair disposition.

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[28]Ex. G at 8-12; Ex. J at 3-7.

B.

The Court Of Appeals Erroneously Applied A New Rule 56 Standard In Determining That The Unique State of Texas Governmental Copier Business Did Not Constitute A Relevant Submarket For Antitrust Analysis.

First, and foremost, Savin presented no summary judgment evidence of any nature in connection with the relevant market issue. On the other hand, Jayco's expert economist gave a testimonial definition.

Dr. Shelby Hunt, the Editor-in-Chief of the Journal of Marketing defined in detail the relevant market.[29] The Court of Appeals erroneously summarized Dr. Hunt's testimony

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[29]Ex. V at 77-81.

as no more than a reference to the "convenience copier market." Jayco Systems, supra at 319. This ignores: (1) Savin's failure to submit any summary judgment evidence on the relevant market; (2) the reality that all commerce occurs in some market; and (3) the significant evidence of the relevant submarket in the record.

First, this Court has held that a summary judgment was erroneous although the Plaintiff's complaint did not even allege a relevant market. Poller v. Columbia Broadcasting System, supra at 474. Furthermore, the relevant market definition is virtually always a question of fact. See Seidenstein, M.D. v. National Medical Enterprises, 769 F.2d 1100, 1106 (5th Cir. 1985).

This Court has recognized that an element of "fuzziness" would seem inherent in any attempt to delineate relevant markets. U.S. v. Connecticut National Bank, 418 U.S. 656, 669, 94 S.Ct. 2788, 2796, 41 L.Ed.2d 1016 (1974). Thus, a party need only supply a "rough approximation" of...markets in meeting its burden at trial. Id. at 2797; accord, C.E. Services, Inc. v. Control Data Corp., 759 F.2d 1241, 1245-46 (5th Cir.), cert. denied, _____ U.S._____, 106 S.Ct. 604, ___L.Ed.2d___ (1985). (Approach definition with trepidation). The approximations in this case are not rough. They are well-defined. Savin's absolute control over the State of Texas contract awards and pricing underscores the validity of Jayco's market definition.

Dr. Hunt testified that the "convenience copier market" consisted of copy machines performing less than 30 copies per minute, relatively inexpensive and low volume machines, and generally plain paper bond copiers. Dr. Hunt contrasted this market with: (1) "copy duplicator type machines" which are significantly faster and a higher volume unit; and (2) "duplicator machines" which are an even higher volume, yet. Dr. Hunt testified that Savin machines competed in the lower volume market, thirty (30) copies per minute or less.

Dr. Hunt also recognized that in 1976 the Model 700 series had no effective competitors. Dr. Hunt's research revealed that the machine was outstanding, well-received in

the marketplace, very reliable and very inexpensive. Competitor's machines could not effectively compete on price, performance or reliability with the Savin machines. Those machines that could compete would be much more expensive than the Savin machines.[30]

Dr. Hunt further defined the relevance of this product in terms of the State of Texas copier business and the opportunities for Savin dealers to compete for the State of Texas business. Importantly, Savin never made an evidentiary challenge to Dr. Hunt's definition of the relevant market. Neither did the witnesses.

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[30]Note 14 supra; See Ex. V at 79-81.

In developing the relevant market definition, it is well-recognized that circumscribing market power is the "ultimate consideration." Ball Memorial Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1336 (7th Cir. 1986). Further, current sales do not always indicate power over sales or over "tomorrow's prices." Id.; See also U.S. v. General Dynamics Corp., 415 U.S. 486, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974).

Market power herein is properly analyzed in an uncommon circumstance where no interbrand competition acted as a check on intrabrand restraints. The consumer welfare, [state agencies] was seriously cheated by supracompetitive prices.[31] See Affiliated

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[31]Ex. M at 11; Ex. K at 26-27; Ex. V at 80-81.

Capital Corp. v. City of Houston, 735 F.2d 1555, 1558-63 (5th Cir. 1984)(en banc), cert. denied, ___ U.S. ___, 105 S.Ct. 1164, 84 L.Ed.2d 316 (1986).

A past Savin State of Texas copier business manager, Mary Wilson, underscored Savin's virtual "strangle-hold" over the State's convenience copier market: (1) Savin's reign was absolute during the relevant annual rental contract periods; and (2) virtually absolute in the open-market purchases. Although the State received a plentitude of open-market requests, Savin dominated 95% of the bids on which it competed.

According to Ms. Wilson, Savin's monopoly control over the State of Texas copier busi-

ness was the product of four (4) symbiotic factors: (1) a superior copier in a price range "all its own;" (2) power over pricing; (3) restraints on dealer competition; and (4) unshakeable "political" relationships with certain State of Texas officials. Savin's domination allowed Ms. Wilson to successfully bid Savin copiers to the State for approximately $4,800.00 at a time when general retail customers could purchase the same machine in Houston, for instance, for approximately $2,200.00.

Finally, Ms. Wilson confirmed that had Savin [or Jayco] ever lost any Texas State annual rental contract, no return of machines was likely. Therefore, the loss of an annual rental contract was not synonomous with the

return of rental machines as speculated by the Fifth Circuit. Jayco Systems, supra at 315. In fact, such a return was unlikely, for the agency generally continued to use the machine so long as it properly performed.[32]

Second, Jayco, in its own Motion for Summary Judgment, explicitly defined the relevant sub-market as: (1) bids on the State of Texas annual rental contracts; and (2) the "open market" sales by Savin to State agencies. [33]

Testimonial support of Jayco's relevant market definition has been consistent and

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[32]Ex. M at 3-20.

[33]Ex. W at 3-18; Ex. X at 1-3.

uncontroverted. For example, Ms. Wilson unequivocally testified that between 1976 and 1981, the Savin operated in a competitive vacuum.[34]

Underscoring Ms. Wilson's testimony was that of Larry Stutes, a previous Savin Area Manager who supervised Savin's State of Texas photocopier business after 1976. To begin, Mr. Stutes was cognizant that several independent Savin dealers who agreed not to compete for the State copier business were often "fierce" day-to-day competitors.

Moreoever, Mr. Stutes testified that there was no effective competition for the

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[34]Ex. M at 3-20.

Savin 700's during 1975-1979. For its price, the machine was the most reliable in that particular market. In fact, the only competition for the sale of Savin equipment was from other Savin distributors in a given territory, such as Dallas. Finally, and critically, Mr. Stutes testified that Savin was "king" of the convenience copier industry in the United States, outplacing both Xerox and IBM combined. Thus, Mr. Stute's first-hand knowledge confirms that Savin copier equipment dominated the marketplace. [35]

Complementing Jayco's definitional arsenal was Bob Mayes, an original conspirator. Mr. Mayes confirmed that: (1) Mr.

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[35] Ex. L at 2, 5, 7-9, 15-16, 17-18.

Jerry Andreff of Jayco had extensive experience in the State copier business; (2) Mr. Andreff had managed the State of Texas contracts for Saxon prior to joining Jayco; and (3) Jayco intended to bid on the State of Texas business.

Mr. Mayes also testified that the State paid $4,600.00, or more, per Savin copier at a time when the general retail public could purchase the same machine for $4,000.00 or less. As Mr. Mayes noted, the Savin price-fixing arrangement was profitable for the Savin "cartel" and costly for the State of Texas.[36]

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[36]Ex. K at 2-27.

Savin dominated annual and open market contracts for the Texas governmental copier market for contracts under 75,000 copies per month. Savin created its monopoly by and through its: (1) "special" relationship with certain State officials; (2) unique product and "marketing" scheme; and (3) effective "snuffing-out" of competition from its own independent dealers. See Graphic Products Distributors v. Itek Corp., 717 F.2d 1560 (11th Cir. 1983).[37]

Uncontroverted testimony makes Savin's pervasive and perverted dominance of the State copier business painfully obvious. Savin's product had no equal and it prevented

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[37]Note 36, supra.

all other potential competitors from "cracking the entry barriers." Savin's price control rewarded the Savin conspiracy with prices substantially steeper than those available in the general retail copier market. Therefore, the State of Texas business was, indeed, the relevant antitrust submarket.

II.

The Court Of Appeals Erred In Determining That The Rule Of Reason Rather Than The Per Se Rule Applied In Circumstances Involving Conspiratorial Bid-Rigging, Price-Fixing And Agreements Not To Compete

The Court of Appeals recognized that price-fixing, resale price maintenance, group boycotts and certain types of reciprocal dealing all receive per se treatment. Yet,

the Court inexplicably evaluated those claims herein under the rule of reason.

The Fifth Circuit's resort to the rule of reason unjustly rewarded Savin, who: (1) denied the occurrence of the restraints; and therefore, (2) offered no pro-competitive justifications. Thus, Savin failed to satisfy those conditions precedent.

Perhaps the Court was abandoning the long-established per se treatment of price-fixing conspiracies. In any event, the Court's faulty analysis was glaring in its generous predisposition to forgive Savin for its pernicious conduct.

First, price-fixing remains per se unlawful. See Arizona v. Maricopa County

Medical Soc., 457 U.S. 332, 102 S.Ct. 2466, 2474-75, 73 L.Ed.2d 2048 (1982). Moreover, the retail price maintenance maintained by the Savin combination in regard to "open market" sales of copiers and supplies similarly is deserving of per se treatment. Id.; accord, Greene v. General Foods Corporation, 517 F.2d 635 (5th Cir. 1975), cert. denied, 424 U.S. 492, 96 S.Ct 1409, 47 L.Ed.2d 348 (1976).

Second, a per se violation occurs when a refusal to deal or an act to terminate a customer comes at the behest of the customer's competitor. Id. 317-18. Nonetheless, the Court ignored explicit testimony of termination threats by Savin representatives were at the behest of Mr. Jim Lawson, a Savin

dealer who controlled the "open market" copier business.[38]

It is difficult to fathom such threats could reflect a "competitive policy" that is anything but pernicious. Surely, it has no conceivable redeeming virtue. For that reason, Savin's actions should be evaluated under the per se standard. See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977). Moreover, since Savin offered no procompetitive evidence or rationale for even the non-price restraints, it forfeited any refuge under the rule of reason. See also Graphic Products Distributors, supra at 1575-77.

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[38]Ex. M at 6, 10-11; Ex. N at 31-34.

The Savin combination has thus far been excused for its patently unlawful conduct. Neither Jayco nor the taxpayers of the State of Texas deserve such unwarranted punishment.

III.

The Court Of Appeals Erred In Applying An Erroneous Rule 56 Standard In Failing To Render A Summary Judgment On Jayco's Antitrust Claims In View Of: (1) Undisputed Admissions By Conspirators Of Their Personal Participation In The Bid-Rigging; (2) Undisputed Interest And Uncontroverted Preparedness; And (3) Uncontroverted Expert Opinion On The Extent Of Damages.

Jayco more than amply demonstrated its right to a judgment based upon the uncontroverted facts herein.

Jayco is cognizant that because antitrust defendants nearly uniformly deny any wrong-

doing, antitrust plaintiffs are infrequently granted summary judgment in their favor. Moreover, it is unusually difficult, if not impossible, for an antitrust plaintiff to secure direct evidence of a defendant's illegal actions.

Nonetheless, this particular case presents uncontroverted evidence of: (1) conspirator's confessions of antitrust violations; (2) ex-Savin management admissions of wrongdoing; (3) Jayco's interest, experience and financial readiness to obtain the State copier business; and (4) an expert opinion on damages by Mr. Pat Loconto, an antitrust expert.[39]

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[39]Ex. O at 2-11.

Savin presented no controverting testimony as to any of the above evidence. First, no Savin expert disputed Mr. Loconto's expert opinion. Second, no Savin expert controverted Ms. Collins' opinion that Jayco was prepared to service the bid.

In sum, Jayco's competent summary judgment evidence was never controverted by Savin. Jayco was, therefore, entitled to have a judgment rendered in its favor. Rule 56 should be equally applied against antitrust defendants. e.g., Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416, 80 L.Ed. 2013 (1945); Penne v. Greater Minneapolis Area Bd. of Realtors, 604 F.2d 1143 (8th Cir. 1979).

In the instant suit, the Fifth Circuit stretched the limit of Rule 56 to its

breaking point in order to sustain Savin's summary judgment awarded to Savin by the District Court. Jayco is not asking this Court to likewise expand Rule 56's standard in evaluating its right to summary judgment. Jayco simply requests that the Supreme Court apply the appropriate standard.

There is no doubt that in the State convenience copier market: (1) Savin precluded competitive bidding; (2) Savin had the willing participation of some State officials; and (3) Savin dealers were actually threatened with termination for simply submitting a competitive bid. The affidavits and testimony of those witnesses are relatively brief and Jayco prays that the Court will review them in their entirety.

The Court of Appeals' holding that Savin acted through Uni-Copy, who only served as Savin's agent for submitting bids, is a major error. Rather than a mere agent, the conspiring Austin dealer managed the entirety of the market.

The relationship between Savin and the Austin dealer, initially Modern Methods and later Uni-Copy, resulted in price manipulation. See Greene, supra. Savin's participation was extremely limited from 1976 and for several years thereafter. Savin did not have: (1) any office in the State of Texas; (2) any corporate service capabilities in the State; (3) any salesmen in the State; and (4) did not submit "open market" bids.[40]

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[40]Ex. K at 10-11.

More importantly, annual bids were submitted only after due deliberation between Savin and Uni-Copy regarding the price to be bid.[41]

On the other hand, the Austin dealer, in combination with other Savin dealers: (1) submitted all "open market" bids; (2) installed all machines throughout the State; (3) performed service and maintenance on all machines throughout the State; (4) responded to agency complaints; and (5) marketed the sale and rental of Savin copiers and supplies. The Savin Corporation performed none of those functions. Savin's role was limited to: (1) processing paper work for the billing; and (2) unlawfully submitting an

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[41] Ex. M at 4-7.

annual rental bid in conspiracy with the Austin dealer.[42] Savin failed to achieve the "agency exception;" rather its conduct constituted price-fixing. See Greene, supra.

The violations are uncontroverted. Jayco's historical state participation was uncontroverted. The Savin conspiracy's absolute control over the State business was uncontroverted. Mr. Locoto's damages opinion was uncontroverted. In view of those uncontroverted facts, Jayco is entitled to have judgment rendered in its favor.

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[42]Ex. U at 5-6.

CONCLUSION

The Court of Appeals failed to apply the proper Rule 56 standard in evaluating both Savin's and Jayco's Motions for Summary Judgment. On the one hand, the Court indulged inferences in favor of the movant, Savin. On the other hand, the Court refused to apply the appropriate Rule 56 standard to the uncontroverted claims of Jayco. The result is a terribly unjust opinion which unabashedly tolerates a flagrant restraint of trade. The State of Texas taxpayers paid supra-competitive prices for copiers and supplies.

No party to this case has labored under any misconception. Yet, Savin failed to controvert the stinging admissions of a Savin bid-rigging conspiracy in full flower.

Jayco understands that the policy of the antitrust laws is to encourage interbrand competition. Where, as here, interbrand competition did not exist, intrabrand competition became the sole source of consumer satisfaction.

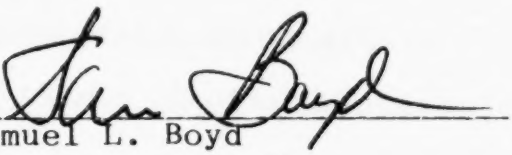
Savin's unlawfully obtained control over the State's annual rental contracts and the "open market" bids for convenience copiers and supplies should attract the attention of this Court.

WHEREFORE, PREMISES CONSIDERED, Jayco respectfully prays that the Supreme Court grant its Petition for a Writ of Certiorari, that the Supreme Court reverse the Judgment of the Court of Appeals, that the Supreme Court render judgment in favor of Jayco on

its claims under both Sections 1 and 2 of the Sherman Act, and for such other and further relief, whether at law or in equity, to which Jayco is justly entitled.

Respectfully submitted,

BOYD & FULTS

By: 
Samuel L. Boyd

Priscilla E. Perry

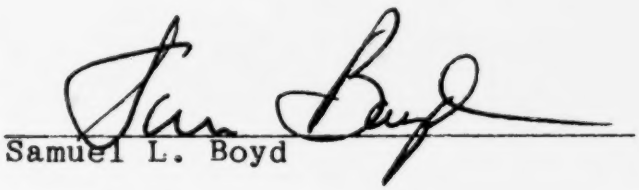
2001 Bryan Tower, Suite 2700
Dallas, Texas 75201
(214) 922-0099

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Writ of

Certiorari has been served on this the 28th day of April, 1986, on counsel for the Respondent by personal service.



Samuel L. Boyd

85-1856

Supreme Court, U.S.
FILED
APR 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAYCO SYSTEMS, INC.,

Petitioners,

v.

SAVIN BUSINESS MACHINES CORPORATION

Respondent.

APPENDIX I TO THE PETITION FOR WRIT OF CERTIORARI EXHIBITS A — I

BEST AVAILABLE COPY

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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EXHIBIT V: Oral Deposition of Shelby D. Hunt

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EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1677

JAYCO SYSTEMS, INC.,

Plaintiff-Appellant,

versus

SAVIN BUSINESS MACHINES CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 29, 1985, 5 Cir., 198__, _____F.2d ___) (January 29, 1986)

Before GOLDBERG, REAVLEY and GARWOOD, Circuit Judges.

EXHIBIT A

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Reharing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the recon-

sideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, reharing en banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavely
United States Circuit Judge

REHG-6

EXHIBIT B

See, Jayco Systems v. Savin Business Machines Corp., 777 F.2d 306 (5th Cir. 1985).

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK,	§	
Plaintiffs,	§	
vs.	§	
SAVIN BUSINESS MACHINES CORPORATION,	§	NO. CA3-78-0060-H
Defendant,	§	
vs.	§	
AMERICAN BUSINESS PRODUCTS, INC.,	§	
Third-Party Defendant.	§	

FINAL JUDGMENT

On this date the Court was advised by the attorneys for all parties that the parties had entered into a settlement

agreement and were jointly moving the Court for the entry of a final judgment in the form set forth below. The Court finds that the request is well taken and that the final judgment set forth herein should be rendered. It is, therefore,

ORDERED, ADJUDGED and DECREED that the claims asserted by Jayco Systems, Inc. against Savin Corporation in the Fourth Amended Complaint that:

(1) Savin monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act the sale and rental of photocopies machines and supplies to agencies of the State of Texas between May, 1976 and August 31, 1981; and

(2) Savin engaged in an

unlawful conspiracy in restraint of trade in violation of Section 1 of the Sherman Act with respect to the sale and rental by Savin of photocopier machines and supplies to agencies of the State of Texas between May, 1976 and August 31, 1981;

are both hereby dismissed with prejudice in conformance with and pursuant to the prior partial summary judgment in this matter.

Jayco has stated that it excepts to such ruling with regard to those anti-trust claims and intends to appeal same. The settlement between the parties does not preclude such appeal.

By agreement of all parties and at their request it is further ORDERED, ADJUDGED and DECREED that all other claims, coun-

terclaims, third party claims, and all other claims whatsoever which were or which could have been asserted herein by Jayco Systems, Inc., Jim Woznick, and Shirley Woznick against Savin Corporation, by Savin Corporation against Jayco Systems, Inc., James Woznick, Shirely Woznick and American Business Products, Inc., and by American Business Products, Inc. against Savin Corporation are all hereby dismissed with prejudice to the refiling of same.

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK,	§	
Plaintiffs,	§	CIVIL CAUSE NO.
vs.	§	CA3-78-0060-H
SAVIN BUSINESS MACHINES CORPORATION,	§	
Defendant,	§	

* *

ORAL DEPOSITION OF TRENT FOWLER

* *

ANSWERS AND DEPOSITION OF TRENT FOWLER, a witness called by the Plaintiff, taken before Tamala L. Collier, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the

EXHIBIT D

14th day of July, 1982, between the hours of 1:30 p.m. and 7:00 p.m., at Texas Commerce Bank Bldg, 13th Floor, Austin, Texas, pursuant to the agreement of counsel for the respective parties as hereinafter set forth.

guess on my part.

Q. Okay.

A. I'm sure we could go to these records and find out, but it happened several times.

Q. Okay. Is this the Xerox --

A. Xerox was successful several times in the low volume range.

Q. Okay.

A. In the high volume ranges, as I recall, IBM and AM were successful.

Q. All right, sir. If you had to, in your best recollection, apply percentage to the number of machines supplied since 1976 by Savin as compared to other suppliers --

A. Uh-huh.

Q. -- would it be more or less than

70 percent of machines placed, if you know?

MR. BRYANT: Is this directed to rentals, purchases or what?

MR. BOYD: Rentals.

THE WITNESS: I would -- would think that it's more than 70 percent.

MR. BOYD: All right, sir.

THE WITNESS: I wouldn't..

the state purchasing commission?

MR. BRYANT: Object to the question. It calls for a --

QUESTIONS BY MR. BOYD:

Q. Do you know? In 1976?

MR. PRICE: Can you rephrase that?

QUESTIONS BY MR. BOYD:

Q. Was Mr. Gersbach -- in his position as purchasing agent for A & M, was he an integral or separate from the regular state purchasing agent over here that handled photocopier business? In other words, did A & M do its business and the State of Texas do its own business?

A. Well, that's kind of a hard

question to ask. Sometimes A & M does their own business and sometimes they do it with the State of Texas.

Q. Okay. If they get a copier that's described by the specifications on the bond copier rental contract, does A & M handle it directly with the vendor in 1976, did they; or did they have to go through the state procedures that everybody else did?

A. Well, I think you're going to have to be more specific if I answer that question now.

Q. Okay. I will. If somebody with mental health department -- whatever it was called back in '76 -- wanted two machines that were part of the contract, described by the specifications in the contract, and a contract which had been awarded to -- for instance, Savin -- and they made a request to state purchasing people for two copiers on contract, would they not go through the purchasing commission as a normal course of events in order to get those machines?

A. If it's contract machines and they wanted contract machines, they would go through the purchasing commission or board of

control.

Q. Okay. Now, if A & M wanted contract machines, who would they go through?

A. If they wanted contract machines, they can go through the purchasing commission or they can get them with local funds or do whatever they want to.

Q. If they want contract machines, though, do they deal on their own; or do they

deal with the state officials, like everybody else?

A. That would be impossible to answer. Sometimes they do one. Sometimes they do the other.

Q. Okay.

A. As do all universities.

Q. Okay.

A. Or anybody else that has federal grant funds.

Q. Okay. And as I understand your testimony then, a number of state agencies in seeking to obtain machines on the bond copier rental contracts often would go directly to the vendor rather than through state purchasing commission in '76, '77, in that time frame?

MR. PRICE: Is that a question?

MR. BOYD: Yes.

QUESTIONS BY MR. BOYD:

Q. Is that what you're saying?

A. If it's rented with nonappropriated money through the Legislature, they don't have to go through the purchasing commission.

Q. If it's rented with appropriated

money?

A. Then they should be going through the purchasing commission.

Q. Okay, And we're talking about the time frame '76, '77.

A. Nothing's changed on that.

Q. Okay. Mr. Gersbach was there from A & M. Was there anybody else that you can remember that was there?

A. I just didn't know the dealers. They were all -- they were all new to me. I can't recall.

Q. Okay. How long was the meeting? Do you recall, generally speaking?

A. Oh, I don't know. The meeting probably lasted all day. I didn't get there -- I made a short talk. I didn't get there,

you know, until practically it was over. They may have gone all day. They may have gone two days. I don't know.

Q. Okay.

MR. PRICE: I'll say this right in front of you. I'm not trying to hide anything. I want you to be responsive to the questions he asks and I want you to tell

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC.,	§	
JIM WOZNICK and	§	
SHIRLEY WOZNICK	§	
	§	
V.	§	CIVIL ACTION
	§	NO. 3-78-0060-H
SAVIN BUSINESS	§	
MACHINES CORPROATION	§	

ORAL DEPOSITION OF CALVIN HOLMAN

ANSWER AND DEPOSITION OF CALVIN HOLMAN, a witness called by the Plaintiff, taken before Mary K. Pfleiderer, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 17th day of September, 1981, between the hours of 10:00 a.m. and 11:30 a.m., at the offices of Calvin Holman, LBJ State Office Building, 9th Floor, Austin, Texas, pursuant

EXHIBIT E

to the agreement of counsel for the respective parties as hereinafter set forth.

monthly use charge, the copy charge, the supply cost, energy cost. We try to come up with the actual cost of a piece of equipment to the State per copy. And it's awarded, then, the low bidder who can also meet other criteria such as service, reputation and things of that sort.

Q. Based on your experience, could you give me some idea of what you mean by reputation?

A. If we had a company who had a very poor history of either servicing their products, the product had a reputation of many, many service calls -- oh, there's any number of things that could enter into that.

Q. Do you give any consideration to the length of time that the particular bidder

has been in business?

A. Well, certainly that has to enter into your -- your initial review. Nearly any of the copy machines that we place under contract, we've either tested them ourselves or had other State agencies test them before we would make a contract of the magnitude that we're talking about here. We just would not put any copy machine under contract without some knowledge of the -- the company who was supporting it and the...

recommendation with -- along with mine to the Director for Purchasing here at the State Purchasing and General Services Commission; and he's the one that finally approves and signs the contract.

Q. When these contracts that are signed on the contract system --

A. Yes.

Q. -- does that -- is the purpose to fix a price at which these various machines will be rented to the various agencies of the State of Texas?

A. That's correct.

Q. For a one-year period?

A. For a one-year -- Well, I said normally one year. We had a contract I believe in 1979 that we had the ability to

extend it for one year. All of them prior to that time to the best of my recollection were only a one-year contract with no extensions.

Q. Is it accurate to say, then, that the individual agencies may or may not decide if they want to rent any machines under this master contract during the coming year?

A. That's a -- that's correct. It's...

more or less of a requirements contract. We order our requirements from them. If we don't have any requirements, we don't order anything from them.

Q. And your agency or the various agencies of the State of Texas are not required to buy one single -- or not required to rent one single piece of equipment under these -- under this contract system?

A. That's correct. Our agreement is only that if we do rent that type of equipment, that we will get it from them, from the contractor.

Q. For a certain price?

A. For a certain price.

Q. Could you give me some list -- I recognize it might not be a complete list,

but could you just itemize for me the different photocopy companies that have entered into this type of arrangement with the State of Texas under this contract system within the last six or seven years.

MR. BOYD: Okay. You're talking about for the equipment we've got here or --

Q. -- Savin was on any kind of photocopier?

A. It went into effect September 1; so, you know, within four to six weeks of that date would have been when it was signed.

Q. Do you require among other things some type of financial report from any bidder?

A. On our application for a place on our mail list we ask them to give us information such as Dun & Bradstreet or commercial rating, the net worth of the company. We have a little bit of a problem requiring that this be completed with today's Privacy Act, but most companies are willing to give us that information.

Q. Would the net worth of the com-

pany affect your consideration of a bid?

MR. BOYD: Which kind are we talking? Are we talking about a purchase or a contract --

MR. BRYANT: One of these contract system bids.

THE WITNESS: It could. I don't recall any time in the copy machine area where it ever has.

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC.,	§	
JIM WOZNICK and	§	
SHIRLEY WOZNICK	§	
	§	
V.	§	CIVIL ACTION
	§	NO. 3-78-0060-H
SAVIN BUSINESS	§	
MACHINES CORPROATION	§	

- - -

APPEARANCES:

KELSOE & AYRES
Suite 101, 5744 LBJ Freeway
Dallas, Texas 75240
By Mr. Samuel L. Boyd,

For Plaintiffs;

CARRINGTON, COLEMAN, SLOMAN,
JOHNSON & BLUMENTHAL
3000 One Main Place
Dallas, Texas 75240
By Mr. Corbet F. Bryant, Jr.,

For Defendant.

ALSO PRESENT: Shirley Woznick

- - -

DEPOSITION OF MR. JIM WOZNICK

EXHIBIT F

DEPOSITION OF MR. JIM WOZNICK, produced as a witness at the instance of Plaintiff, taken in the above styled and numbered cause on the 3rd day of March, A.D., 1980 at 10:45 a.m. before Dan L. Stunkard, a Notary Public in and for the State of

unmistakeable impression by their actions and conduct, as well as by their own words and letters, that they would not be coming back into the sale of bond copiers in the territory for at least a three year period of the noncompete agreement. Was there anything expressed to you that there would be no branch in this area for three years?

A. They said they would not ever contemplate coming back in with a branch because the branches were unsuccessful, which is whey they were selling to a dealer.

Q. Wo said that?

A. Art Nendick.

Q. Anybody else?

A. No.

Q. Now, let me ask you a couple of

questions about the State of Texas and any attempts to get business from the State of Texas. Did Jayco at any time make any proposal to any agency of the State of Texas or the State of Texas itself for Canon machines?

A. Yes, they did.

Q. When was that made?

A. I'll have to say May of 1975.

Q. Who handled that for Jayco?

A. Jerry Andreff, vice-president of marketing.

Q. Do you recall how many machines were invclved?

A. Sixty machines.

Q. What was the background leading up to that proposal?

A. My understanding was they had discussed both dry toner and liquid toner machines.

Q. Who had Jerry discussed that with?

A. I believe Trent Fowler, but I wouldn't say for sure. He had talked with several people at the State. He was very familiar with all of them.

Q. And was was the net result of

that?

A. The net result was they had preferred a liquid toner machine.

Q. Which meant Canon?

A. Which had to be Canon.

Q. Were there discussions about Savin products in that period of time?

A. There had been.

Q. And Trent Fowler indicated that he didn't have a desire to do that?

A. I don't know if Trent Fowler said he didn't have that desire but somebody that had some...

control over that decision said that. There were two or three people involved in it with the State that Jerry had contract with. They had previously discussed a rental program on the Savin 300s.

Q. Did the State of Texas accept any proposal for Canon machines?

A. Yes, they did.

Q. Were those machines placed with them by Jayco?

A. Yes, they were.

Q. When did that start? When did they take delivery on those?

A. I believe it started the end of August. It was supposed to be done around the first week of September.

Q. Of 1975?

A. 1975.

Q. What was the locality for those 60 machines?

A. They were pretty much throughout the State.

Q. Does Jayco still have any of those machines with the State of Texas?

A. I really don't know because when we, when Jayco and -- separated out the Canon part with...

Jerry Andreff, those machines and all their records went with them.

Q. So you don't know the subsequent history on those 60 machines?

A. I do not.

Q. How was Savin involved in any of this process with the State of Texas, to your knowledge?

A. On that particular sale? They weren't involved.

Q. How was Savin involved in any attempt to get business from the State of Texas where Jayco was involved?

A. Jayco had been trying to get some Savin 300s in on a rental program unsuccessfully.

Q. When did those efforts start?

A. I'm really not sure. Jerry Andreff would be more familiar with that timing on that, when he started because ever since we started Jayco, he was making trips to Austin to visit with State people because he knew them, had done business with them as a Saxon representative and was very interested in getting some of that business for Jayco.

Q. Do you personally know the involvement that Mr. Nendick or anyone else had with the State of Texas in attempts by Jerry Andreff to get...

business down there?

A. Nothing other than I was told by Jerry Andreff and a letter that I saw from Art Nendick to Jerry Andreff.

Q. You didn't have any personal knowledge about that situation other than those two documents?

A. Right.

Q. Or those two sources?

A. Jerry and I talked about it.

Q. What did he say to you about it?

A. That he was working on something and he was most happy that Art Nendick had written him a letter asking him to meet with him and he was on the phone with him several times trying to set it up.

Q. Do you know what happened at any

meeting, what went on?

A. At the State office?

Q. Yes.

A. No, I do not.

Q. Well, let me just simply ask you, what do you believe Savin did wrong or improperly involved in the State of Texas account or what did Savin do in any way to harm or fail to assist Jayco on that?

A. Very definitely they did wrong.

Q. What precisely was that?

A. Jayco had already been in there, we had tried to do business with the Savin 300s, they were unable to back us on that and told us so. The other dealers, without Savin's backing, would not go along with it in the other regions and the State bid was to be throughout the State, not just with this northern region where we could handle it from Dallas.

Q. What do you mean first of all that Savin indicated it was not willing to back you?

A. You needed service to Savin 300s, we realized that. We didn't know how much service we needed at that time, how bad it was going to be, but we knew we needed

service people to cover various areas. Either you do it through existing 300 dealers or through the Savin service man that lives in the state, in Houston, Blackie Marta, that no one was willing to stand behind the 300.

Q. Then subsequent to that, what do you feel Savin did wrong?

A. Then I think when Jerry, at that time, when he finally heard about the 700 series, later on after that purchase by the Department of Public Welfare on the 60 Canons, talked about the 700

series, the 750 specifically, to the State.

Q. With Jerry Andreff?

A. Yes. And if I'm informed correctly, he was the first one to talk about it to the State. That would have to be verified by Mr. Andreff.

Q. What further knowledge to you have about Andreff after that?

A. Nothing other than there were several phone calls with Art Nendick.

Q. About who?

A. By Jerry Andreff. He was very excited about the fact that he had contact with the State and that they were interested in the 700 series, the 750 specifically, and that and Art wanted to get together with him to be introduced.

Q. Is that what Jerry has told you?

A. Yes.

Q. You didn't participate yourself in those conversations?

A. I did not.

Q. Do you have any knowledge about what happened after that?

A. Nothing other than, nothing more happened with Jerry Andreff. They never came back to him.

Q. Do you know that did happen?

A. Yes. They worked with another dealer that had been set up new in Austin by the name of Modern Methods. And his name was Bob Mayes.

Q. Have you spoken with Mr. Mayes about any of this?

A. Bob Mayes has told me that he went to the State with Art Nendick.

Q. And Bob Mayes made a proposal or is that your understanding?

A. My understanding was that Savin made the proposal.

Q. Was there ever any discussion with you concerning a dealership in Austin for Jayco?

A. Jerry told me that would be part of the program of getting the 300s back in

the 300 offer that he was making, was that we would need an Austin office to handle the State business as well as probably a service center working out of that area. That it would be a small office but would handle all that business and would grow as needed.

Q. Did Jerry ever say what Savin's response to that was?

A. That was part of the program. They were talking about having, we would need an office there if Jayco did it.

customers you could sell to. I'm going to ask you, do you recall anything about Pat Stoffee's letter in regard to national accounts? Do you recall any kind of limitations at all?

A. I really don't, without rereading that. I think it was we were not supposed to be doing, making any sales of any kind on national accounts.

Q. Would you have wanted to sell national accounts if you hadn't been precluded from doing so?

A. We had the opportunity to asking us to perform and service them here locally, why not, that's what we are here for.

Q. What about the State of Texas,

you testified earlier a great deal about it, but did you have a desire or get a bid from the State of Texas for plain paper bond copiers?

A. That was the part of -- very much a part of our overall plan when we initiated Jayco, because of the expertise Jerry Andreff had working with the State and havin been with Saxon and consummating these type programs with both the State of Texas and other areas.

Q. All right. And do you have any complaint about whether, concerning the subject of shipping or installment commissions as to whether or not you...

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK,	§	
Plaintiffs,	§	
vs.	§	
SAVIN BUSINESS MACHINES CORPORATION,	§	NO. CA3-78-0060-H
Defendant,	§	
vs.	§	
AMERICAN BUSINESS PRODUCTS, INC.,	§	
Third-Party Defendant.	§	

AFFIDAVIT OF JIM WOZNICK

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared JIM WOZNICK

who, after being first duly sworn, stated under oath as follows:

1. "My name is Jim Woznick. I am over the age of eighteen (18) years, of sound mind, and competent to make this affidavit in all respects, that the statements contained herein are within my own personal knowledge, and are true and correct.

2. "I am the President of Jayco Systems, Inc., and am a Plaintiff in this lawsuit, as is Jayco Systems, Inc. I have given previous Affidavits in this case, and I am giving this additional Affidavit in opposition to Savin's Motions for Summary Judgment.

3. "In responding to contentions of Savin that I should have discovered the fraud practiced upon me in connection with the

Savin 300's, I would merely refer the Court to the deposition testimony of Mr. William Schuelke, the National Service Manager for Savin at the time we acquired the Savin Branch in Dallas. Schuelke Depo. at pages 68-71, Exhibit "B". In those few pages of testimony, Mr. Schuelke confirms that dealers were told that the problems with the Savin 300's related to the problems of the dealer and not the problems with the machines. Mr. Schuelke admits that this was false, and that he made these false representations to pacify dealer complaints. He did this on instructions from Mr. Dick Mathies, his superior at Savin Corporation headquarters.

4. "Mr. Schuelke also admitted in his testimony that he knew that his representations were false at the time he made them,

and that the problem was actually with the machine, and not with the particular dealer. I relied on such false representations from Savin Corporation representatives, including Blackie Marta and John Auger, from Savin's National Service Department, and Rod Marcoux, a Vice President of Savin.

5. "I would also like for the Court to know that Mr. Schuelke testified that he received the highest honor that could be bestowed by Savin upon an employee of technical management at the Savin Corporation. At page 80 of his deposition, he testified that he received the Max M. Low Award for Technical Management in 1972. Only one award per year is given.

6. "Mr. Schuelke also testified that the reason the Dallas Branch was sold to

Jayco Systems, Inc. was because of product failure (word processing and bond copiers), and operating losses. That is contained in his deposition at pages 86-90. Exhibit "B". He also testified he was personally involved in Savin's plan to 'get rid of the Branches and get rid of the dead wood.' He testified that the words 'dead wood', utilized by Dick Mathies, referred to Savin's equipment such as the Savin 300.

7. "Despite my many requests to Savin corporate representatives for assistance in connection with the excessive service requirements and the lack of dependability and reliability of the Savin 300 Series machines, I was always told that my service department was not properly trained, or that the service department was not properly main-

taining the machines, or that machines which were not retrofitted were retrofitted. These representations were false, as Mr. Schuelke confirmed, and I relied upon their apparent good faith in dealing with me, despite the fact that the machine was not properly performing in the field. I did, in any event, file an action against the Savin Corporation on December 8, 1977 for fraud. In February of 1979, I filed an amended pleading which set forth the nature of some of those frauds more specifically.

8. "Nonetheless, I did not sit on my rights when I became aware of information which led me to believe that I had possibly been victimized as a result of fraud in connection with the original contract for the dealership or in connection with the acquisi-

tion of machines for sale in the territory or to the State of Texas. At no point since 1974 have I waited as long as two years to file an action on fraud once I became aware of facts which indicated that I might have been a victim of a fraud practiced upon me by Savin, and sometimes others. Not until Art Nendick told me that Savin was not going to abide by the non-compete agreement in the dealership in the Spring of 1976 did I grow suspicious of Savin's intentions.

9. "It was also not until 1983 that I first became aware of the letter from Inwood Business Machines to the Savin Corporation recognizing the price-fixing and non-competition agreement which had been reached between all the other Savin dealers in the Territory and the Dallas Savin Branch. See

Exhibit "A". As I previously stated in an Affidavit, I was invited to join such a conspiracy, but declined.

10. "Finally, in connection with the State of Texas business, I was told by Neil Henriksen, Larry Stutes and others representing Savin, that no dealer would be allowed to submit a competitive bid against Savin or the Austin Savin dealer. I was explicitly informed that competing or commercially interferring with the State of Texas business would be considered grounds for termination. It was for that reason that Jayco did not bid either Savin machines or supplies to the State of Texas.

11. "Further, Jayco did not receive the same special pricing on toner and dispersant that was granted to the conspiring Savin

dealers. Those dealers were able to acquire toner and dispersant as much as $9.00 per TD pack, less than the lowest dealer price. I have read the Affidavit of Robert Mayes, and now know how the dealers could have afforded to bid the TD packs at the price they bid. I could have bid toner and dispersant from other manufacturers had I not feared termination.

12. "Nonetheless, had I been able to receive an allocation of machines and had I been allowed to bid and receive the State of Texas copier business, Jayco would have naturally bid the State of Texas supply contracts, as we had previously done for Canon copiers and other products.

13. "Jayco was definitely interested in the open-market copier contracts, and we

were successful in 1975, well in advance of Savin, in obtaining a contract for approximately $175,000.00 of copiers to be distributed throughout the State. The only reason that Jayco did not submit competitive bids for the open-market purchases is because of the standing threat of termination if anyone 'rocked the boat.' I was specifically advised by Mr. Henriksen and Mr. Stutes early on that competing with either Savin or the Austin Savin dealer would not be tolerated. This has since been confirmed by the Affidavit of Mr. Stutes and Mr. Mayes, who was formerly the Austin dealer, as well as in the deposition given by Mr. Neil Henriksen in this case. The only reason that Jayco did not submit a bid for the June 6, 1976 bid opening was because of the refusal

of Savin to allocate machines to support such a bid. Without the confirmation of that allocation, the State of Texas would not have accepted a bid from Jayco.

14. "Moreover, I was unaware that Savin was combining with Mr. Mayes, the Austin Savin dealer in 1976, to obtain the State of Texas copier business while refusing to allocate machines for a bid Jayco might submit. I was also unaware that the Austin dealer had intended to bid machines for the Austin zone in 1976. Not until I read the Affidavit of Mr. Robert Mayes was I aware of the various aspects of the Savin-Austin Savin dealer State of Texas conspiracy.

15. "Had I been allowed to bid on Savin supplies, and had I not been faced with the threat of termination, should I have

purchased and bid supplies from other manufacturers, I would have bid on the supply contract for the State of Texas. I was specifically advised by Messrs. Henriksen and Stutes that Savin dealers, including us, would not be allowed to purchase toner and dispersant for Savin bond copiers from other manufacturers, unless they were prepared to face the reality of termination. I was also aware of the statement having been made by Mr. Low, the President of Savin, at a Dealer's Council meeting in approximately 1977.

16. "Jayco was a profitable business enterprise in every aspect except the Savin 300 Series plain paper bond copiers, which were not profitable for anyone. Further, as Mr. Schuelke stated above, the machines were

misrepresented, and Savin acted to conceal their defects. Our other copier business, including the Savin 700 Series plain paper bond copiers, and the E-Stat machines, was a profitable business which kept us afloat during the time in which we suffered from the Savin 300 Series machines. Jayco was a going concern, had good credit, and was seeking a dependable and reliable copier which could be obtained in order to bid for a large rental fleet business. Jayco sold many of its assets for approximately $200,000.00, less some modest debt, in January of 1981.

17. "Finally, I have reviewed some of the exhibits which the Savin Corporation has submitted, and I must advise the Court that many of those exhibits contained documents which were never part of the initial

contracts between Savin and Jayco. For instance, counsel for Savin has included a customer list as a Schedule A to the initial non-competition agreement. No schedules of any kind were attached to that contract whatsoever. No discussion regarding a customer list in connection with our dealership agreement was ever discussed in the formation of our business relationship. We had already been in business for a month, and the insertion of a 'customer list' term was a matter which had never been discussed by the parties. A review of Mr. Nendick's letter, prior to our going into business, will make that evident.

18. "I have further reviewed the submitted Undisputed Facts, according to Savin, which have been submitted in connection with

their Motion for Summary Judgment, and can state without qualification that the facts are taken out of context, are not supported by the record, and are directly refuted by the Affidavits, the documents and the depositions. For instance, references that the damage expert believed that Jayco had a line of credit with Republic National Bank is an obvious attempt to take advantage of an equivocal statement made by Mr. Loconto. The line of credit which I had described to Mr. Loconto, had been previously discussed and negotiated with Mr. Robert White, then an officer with First National Bank, rather than Republic Bank. Mr. Loconto's failure to recall the exact Bank was mere inadvertence. In fact, counsel for Savin has been made well aware of the former banking relationships

with First National Bank, but chooses not to refer to those relationships in their statements. Moreover, the Affidavit of Ms. Colleen Collins makes evident that any reasonable banker would have granted the line of credit necessary for Jayco to service the State of Texas business. Further, I have never spoke nor communicated otherwise with any representative of Republic National Bank, have never been evaluated by any representative of that Bank, and have reviewed the deposition of Mr. Bishop who further admitted that he had has no knowledge about me or my credit history, but rather evaluated Mr. Andreff, only."

EXHIBIT G

Further, affiant sayeth not.

JAYCO SYSTEMS, INC.

By Jim Woznick
JIM WOZNICK, President

Jim Woznick
JIM WOZNICK, Individually

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of February, 1984.

Susan L. Keeling
SUSAN L. KEELING, Notary Public in and for the State of Texas

My commission expires September 19, 1985

June 2, 1977

Mr. Rod Marcoux
50 Rose Avenue
Mel Valley, California 94941

Dear Rod:

I am writing you to make you aware of the situation that exists in Dallas.

There is a gentlemen's agreement among Dealers and Branch Sales that we will not untie each others signed orders. This arrangement has been working satisfactorily for several months. Now it no longer suits the purpose of the branch when the deal is large enough for them to violate our agreement.

Without getting into detail about who said what, I will outline the basics.

EXHIBIT "A"

Enclosed is a copy of a signed Rental Agreement from Lomas & Nettleton dated May 10, 1977, we contacted the customers as early as October of 76. We have on several occasions proposed for their consideration, the CMD Program. They are very receptive; however, the decision for CMD was to be based on the performance of the machine to be installed in Dallas on June 1, 1977. The branch meanwhile has offered CMD pricing on the one machine and the P.A. took low bidder.

Neither of us has a signed CMD agreement or letter of intent. The branch installed the machine May 31, 1977. We art pursuing the business and expect to be able to work out the problem locally.

In any event this kind of situation has the potential to repeat every month. The ultimate loser is Savin. It creates confusion in the customers mind and lowers Savin's image.

EXHIBIT "A"

Is it possible to divide CMD/FMD into territories geographically or alphabetically?

Sincerely yours,

Jerry Brag
Inwood Business Machines, Inc.

JB/vw

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK,	§	
Plaintiffs,	§	
vs.	§	
SAVIN BUSINESS MACHINES CORPORATION,	§	NO. CA3-78-0060-H
Defendant,	§	
vs.	§	
AMERICAN BUSINESS PRODUCTS, INC.,	§	
Third-Party Defendant.	§	

DEPOSITION OF WILLIAM H. SCHUELKE

TAKEN ON BEHALF OF THE PLAINTIFFS IN THE ABOVE-ENTITLED ACTION, PURSUANT TO THE PROVISIONS OF THE CODE OF CIVIL PROCEDURE OF

EXHIBIT "B"

THE STATE OF CALIFORNIA, AT THE HOLIDAY INN, ONTARIO, CALIFORNIA, ON THURSDAY, THE 14TH DAY OF FEBRUARY, 1980, AT THE HOUR OF 12:40 P.M., BEFORE S. RENE NEILL STONE, A CERTIFIED SHORTHAND REPORTER AND NOTARY PUBLIC WITHIN AND FOR THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, PURSUANT TO NOTICE.

EXHIBIT "B"

retrofits. Just approximately.

A. I'd say 50, 60 retrofits. Someplace around there, you know.

Q. Are you aware of any reason why the 300's could not have been retrofitted as to these 50 or 60 that you mentioned before they were marketed?

A. The availability for retrofits.

Q. My question is: The problems that these 50 or 60 retrofits related to --

A. Right.

Q. Was there a reason why Savin Corporation couldn't solve these problems before they sold the machines, the 300's?

MR. BRYANT: Would you read the questions back, please.

RECORD READ

MR. BRYANT: Was that different from the question you just asked, or did I not understand it?

MR. BOYD: Let me rephrase it.

Q. (By Mr. Boyd) Let me take you back to the time when the 300's were initially marketed. Was there a reason why these retorfits couldn't have been solved before the 300's were marketed? Is there a reason?

A. A reason why they couldn't be?

Q. Yes.

A. No. Except under the controlled field tests, my feeling was that they weren't getting the right input.

Q. Who wasn't getting the right input?

A. Wayne. Or Wayne wasn'g giving the right input to the corporate people.

Q. Why do you say that?

A. Because I can't see how a piece of equipment could be field tested in a location and come back and say it was ready to market or that they wanted to market it when it was failing.

MR. Bryant: Object to the Nonresponisve answer.

MR. BOYD: I'll ask the question again.

Q. (By Mr. Boyd) The answer may be the same, but let me rephrase the question. My question is: Why, if there is any reason, why the Savin Corporation didn't solve these 50 or 60 areas where there were retrofits before the machine was

first sold to the public? Do you know of any reason why they could not have? And your Answer?

A. No.

Q. Prior to your leaving the Savin Corporation in September of 1974, did you ever receive dealer complaints or branch complaints regarding the performance, the reliability or the dependability of the 300 series machines?

A. Yes.

Q. A few or many?

A. To me, I received quite a few, in my opinion.

MR. BRYANT: I'll object to the question unless it's stated whether these were oral or written complaints.

EXHIBIT "B"

Q. (By Mr. Boyd) Did you receive oral complaints from dealers or branches regarding the 300 series?

A. Yes.

Q. Did you receive any written complaints?

A. Yes. I received written complaints, but not directly to

EXHIBIT "B"

me, through Art Nendick, Marcoux and Dick Mathies.

Q. M A R C O U X. When you say that you received written complaints through them, explain what you mean.

A. Letters came to them, and they make a note on it and send it to me and say to go out and do something, correct it, whatever it takes to pacify the dealer.

Q. When you went out, did you ever make such visits to try to pacify dealers?

A. Yes, I did.

Q. And did you ever determine whether or not the dealer complaints were justified, any of them?

A. Could you restate that?

Q. Yes. were their complaints justified?

A. In my opinion?

Q. Yes, sir. in your opinion.

A. Yes, they were.

Q. What did you tell them or how did you handle these complaints when you visited a dealer or branch?

A. We really would try to cop out on it.

Q. What do you mean, "cop out"?

A. We'd say the retrofits weren't done on the machines, the techs needed to be retrained, their techs weren't called to do it.

Q. Why?

A. Because we couldn't admit to the dealer the problems that we were really having,

because at that time we couldn't take those machines back.

MR. BRYANT: Object to the non-responsive answer.

EXHIBIT "B"

Q. (By Mr. Boyd) Were there any reasons why you say you copped out to the dealers? Just yes or no.

A. Yes.

Q. Tell me each rason why you did so.

A. For one thing, we couldn't -- we couldn't afford to take those machines back.

Q. Was there another reason why?

A. To get the pressure off of us.

Q. Did you ever on these dealer or branch visits tell the complainant, whoever sent in the complaint, that he had tech problems or technician problems, when he actually didn't have technician problems?

EXHIBIT "B"

A. Yes.

MR. BRYANT: Object to the leading questions.

Q. (By Mr. Boyd) The responses you said you made which consisted of a cop-out, did you ever make those responses to a dealer or a branch's complainant knowing that the statements you were making were not true?

A. Yes, I did.

Q. Did you have any directions from anyone in Savin to do so?

A. Not a direct order.

Q. Well, what did you have from anybody in Savin as far as directons or suggestions?

A. To --

EXHIBIT "B"

MR. BRYANT: Object to the ambiguous question.

Q. (By Mr. Boyd) Did anyone in Savin suggest or direct or request that you handle these complaints in any specified manner?

A. Yes.

Q. Who and what did they tell you to do?

A. It was Dick Mathies.

Q. What did Mr. Mathies tell you to do?

A. To go out and try to show the dealer that it was his problems.

Q. Do I understand you to say to try to show the dealers that it was the dealers' problems?

A. Right. Because we couldn't bring the machines back.

Q. When you say that you couldn't bring the machines back, what do you mean?

A. We couldn't bring back everything we put out to a dealer. We had to make those machines work at our cost out in the field.

Q. Did anybody besides Mr. Mathies ever give you any suggestions or guidance as to how to handle these complaints?

A. No.

Q. Did Mr. McNabb ever say anything to you?

A. In a roundabout way, but it was usually through Dick.

EXHIBIT "B"

Q. Regarding the Savin 300 Series bond copier and your experience that you've discussed with it, in your opinion did the Savin school on the 300 qualify a dealer's technician to work on the 300?

EXHIBIT "B"

called me into a meeting --

MR. BRYANT: Objection. Non-responsive answer.

Q. (By Mr. Boyd) After sometime in June 1974, after you had been to the West Coast --

A. Okay.

Q. Would you discuss the facts and circumstances which surrounded the first time you learned of some intrest on the-part of the Savin Corporation in selling its branches that were selling these 300 Series bond copiers?

A. Yes. I returned to the home office, and Dick Mathies called me into his office

and sat me down and showed me maps that had been determined where they were going to get rid of the branches and get rid of the dead wood.

Q. What do you mean, dead wood?

A. Equipment such as the 300. Okay?

Q. What do you mean by dead wood and equipment such as the 300?

A. Nonprofitable.

Q. Was anybody else present with Mr. Mathies while you were discussing this?

A. No. Just him and I.

Q. Did you ever discuss this plan with any other person besides Mr. Mathies?

A. J.J. McNabb, myself and Dick Mathies discussed it.

EXHIBIT "B"

Q. Are the words "dead wood" your words?

A. No.

Q. Whose words are they?

A. Dick Mathies'

Q. Now, what kind of maps did he have?

EXHIBIT "B"

A. They had maps of the United States showing -- they were small maps. It showed what branches we were going to have left, the areas that we wanted to sell, and then in the areas that we were keeping it showed how we were going to pull back. We might have been servicing the 65-mile radius around these branches, and now we were pulling back to a 45-mile radius.

Q. Why was that?

A. For profitability.

Q. What was the criteria, if you recall, that set apart the branches that Savin Corporation wanted to sell as were situated on this map?

EXHIBIT "B"

A. The ones they felt that were nonprofitable or nonprofitable at the time.

Q. Do you recall whether or not Dallas was one of those locations?

A. Yes, it was.

Q. Do you recall any of the other industries that were marked on this map?

A. Houston, New Orleans, Memphis, Cleveland, Cranford, Hartford, Tampa.

Q. Why were you involved in this discussion of which branches they would sell?

A. Because I had to do the dirty work.

Q. What do you mean, the dirty work?

A. Go in and tell the service people that we were going to liquidate them.

Q. Why is that dirty work?

EXHIBIT "B"

A. Because I felt that we should try to move some of these technicians that had been with us for awhile into some of the branches that we had where we had green technicians and try to keep some of our depth in service by moving them. I was instructed that I would give one week severance pay for every year they were with Savin and plus for their vacation. To me, in some cases, it was cheaper to move them to another location and use their ability there instead of just getting rid of them.

Q. Did you determine in any way which you could save some of these technicians?

A. Yes, I did.

Q. What did you do

A. You said, I determined?

EXHIBIT "B"

Q. What did you do?

A. I presented a plan to Dick Mathies which was vetoed.

Q. Did you determine in any way after Mr. Mathies vetoed you plan to save some of these technicians for the corporation?

A. Yes, I did.

Q. What did you decide to do?

A. I took some of the technicians that I felt were capable of doing an excellent job for the corporation and moved them into the dealer end of it, which would support the dealers in those areas.

Q. Do you know whether or not the Savin Corporation engaged in this plan, actually engaged in this plan to sell the branches?

EXHIBIT "B"

A. Yes, they did.

Q. Was it a slow methodical process of many months or negotiations, or what speed did they move with?

A. As fast as possible.

Q. When you say as fast as possible, why is that?

A. They had to get rid of it and generate some type of income.

Q. Why did they have to get rid of branches and generate income?

A. Because they were in to the point of losing money.

Q. Did anybody ever tell you that they were at the point of losing money?

A. Not in a direct statement, but it was always brought up to us that with the product failures that we had, we were in a bad situation.

MR. BRYANT: I'm going to object to the question as being nonresponsive, being vague, not stating the source of double hearsay.

Q. (By Mr. Boyd) Do you know of your own knowledge, do you know any of the major reasons, if there were any, that branches were being sold?

A. Yes.

Q. Tell me what those reasons are.

A. Product failure.

Q. Any other reasons?

A. Losing money.

Q. What product failures are you talking about?

A. Word processing and bond copier.

EXHIBIT "B"

Q. What bond copier are you talking about?

A. 300.

Q. Were there any other reasons that you know of at this time besides lack of revenue and product failures?

A. None.

Q. What was your part and how were you involved exactly, if other than the technician dismissals? Were you involved in any other way? Did it affect your job, this dissolution of branches?

A. In a way, it did affect my job.

Q. In what way? How did it affect what you had to do for a living there.

A. I kew a lot of these techs and people for a long time, and they helped the corporation quite a bit, and I couldn't understand why--

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK,	§	
Plaintiffs,	§	
vs.	§	
SAVIN BUSINESS MACHINES CORPORATION,	§	NO. CA3-78-0060-H
Defendant,	§	

ORAL DEPOSITION

OF

JIM WOZNICK

Answers and deposition of Jim Woznick, produced as a witness at the instance of the Defendant, taken in the above styled and numbered cause on the 18th day of September 1981, at 11:30 A.M., before Tierney Burgett,

a Notary Public in and for the State of Texas, County of Dallas, and Certified Shorthand Reporter in and for the State of Texas, at the offices of Carrington, Coleman, Sloman & Blumenthal, 2500 South Tower, Plaza of the Americas, in the City of Dallas, County of Dallas, State of Texas, in accordance with the agreement hereinafter set forth.

August.

Q. Can you sit here today and give me the name of one person to whom Savin Corporation sold below cost?

A. There were so many cases where the salesmen came back and said they had lost it to the Savin branch because of pricing that I can't recall a name, and I don't know where I'd go back to, what files to go back to to look for it.

MR. BOYD: Do you know of anybody?

THE WITNESS: We did lose sales.

Q. (By Mr. Bryant) There has previously been testimony by you and others concerning

the State of Texas business. I want to make sure that I have all of the information that you have on that subject. I believe there's previously been testimony about placement of the Canon products by Jayco in the State of Texas, is that correct?

A. Yes.

Q. Were there any other bids made by Jayco or placements made by Jayco with the State of Texas, other than the instance of the Canon products that you've already testified about?

A. No. There had been some conversations going on with our vice-president of markeing who had visited

with the State and they had talked about Savin machines and the Savin 300s, and they talked about the Savin 750s after that. And in both cases we received no backing from Savin Corporation, so there was never anything submitted in writing.

Q. I'm not asking you now about Savin products, I'm asking you about other lines apart from Savin. Were there any other attempts made by Jayco to interest the State of Texas in other lines apart from the Savin, in the Canon line you've already told me about?

A. I believe there were some bids submitted on 3M equipment, small machines.

Q. Who submitted those bids?

A. That would have been done by our vice-president of marketing.

Q. What is his name?

A. Jerry Addreff, (spelling) A-d-d-r-e-f-f.

Q. What became of that?

A. We were awarded some of those; I'm not sure how many.

Q. Was this a profitable operation for Jayco?

MR. BOYD: Which one?

MR. BRYANT: The 3M business that you got.

A. There would have been some margin of profit in making the bid or obviously it wouldn't have been

submitted.

Q. (By Mr. Bryant) Did that include service contracts?

A. I would have to look at the specific bid; some of them did and some of them did not.

Q. Was that for locations in various places in Texas?

MR. BOYD: Which bid are you talking about?

MR. BRYANT: I'm talking about the 3M bid.

A. I'm going to say yes, it would have been for various places.

EXHIBIT H

Q. (By Mr. Bryant) Do you recall how Jayco handled the servicing requirements for the 3M machinery?

A. It would depend on what type of equipment it really was, and I dont' recall right now. If it required service it could be taken to a 3M dealer closest to that location or it could have been sent back to us.

Q. Am I correct in understanding that you really don't have much recollection on how that really worked out?

A. I don't think there were that many cases, there were relatively few.

Q. Not many cases of service needs, or you just didn't place many 3M machines?

A. I don't think we placed that many 3M machines.

Q. Was this some type of contract where they would order as they needed them, you didn't enter into the agreement there were going to be one thousand 3M machines, they were ordering and going to receive at some future date?

A. No; they were on an individual basis.

Q. It's just that you established a price and what you would do?

A. Yes.

Q. There is a statement in various documents that you have sworn to concerning a state-

wide network and trained technicians for Canon relating to the Texas bid. What did you mean when you referred to a state-wide network or trained technicians?

A. Dealers that we worked with had trained Canon service people and we had agreed with those dealers that they would handle the service work on any of the Canons that were placed in the territory.

Q. And you would reimburse them when those took place?

A. That's correct.

Q. Can you give me some idea of the volume of business for Savin products as compared to other lines that you were selling or renting for Jayco during the

Q. Who said that?

A. One of them was Neil Herman, who I can remember, and there was somebody else who I don't recall at this time. In Art Felcoff's deposition we were mentioned as price cutters.

Q. Any other source or knowledge that you have on that subject?

A. No that I can think of right now.

Q. When did the placement of the hundred Canon copiers conclude that Jayco plcaed with the State of Texas?

A. It was sixty Canon copiers and they were placed in August, September of 1975.

EXHIBIT H

Q. Was there any -- were those rentals or sales?

A. Those were sales.

Q. Okay. Was there any follow-up on that or was that the only time that there was a sale of Canon copiers by Jayco?

A. With the State only?

Q. Yes.

A. That was the only time prior to the separation of the Canon line later from Jayco.

Q. As of January 1, 1981, just before the sale to American Business Products, was Jayco an authorized

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK,	§	
Plaintiffs,	§	
vs.	§	
SAVIN BUSINESS MACHINES CORPORATION,	§	NO. CA3-78-0060-H
Defendant,	§	
vs.	§	
AMERICAN BUSINESS PRODUCTS, INC.,	§	
Third-Party Defendant.	§	

AFFIDAVIT

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, appeared JAMES WOZNICK, individually, and on behalf of JAYCO SYSTEMS,

INC., an individual residing in Dallas, Texas, who is over eighteen (18) yars of age and capable of giving an affidavit, who, after being first duly sworn, stated under oath as follows:

1. "My name is James Woznick, and I am the President of Jayco Systems, Inc. I am giving this Affidavit in opposition to Savin's Motion for Summary Judgment and in support of Jayco's Motion for Summary Judgment.

2. "I am giving this Affidavit specifically because of the misconstruction of the record by Savin, the erroneous interpretations of testimony attributed to me and Jayco, and because some allegations are simply totally false.

3. "Savin goes to great lengths to

attack the intent and ability of Jayco to handle State contracts. The answer to that is the fact that Jayco had substantially more experience in handling the State of Texas business. Jayco had experience. Savin had none.

4. "Further, Jayco registered its interest in doing the State of Texas business with Art Nendick who initially indictaed a willingness to cooperate, and quickly turned sour. Unknown to anyone at Jayco, Savin was planning to take the business for itself, without allowing Jayco to bid simultaneously. Savin had absolute control over the supply of the Savin 700 series plain paper bond copiers. Jayco could not locate sufficient copiers from any other source to service a State of Texas photocopier bid.

EXHIBIT I

5. "Jayco had a parting of ways with Jerry Andreff, not because of different attitudes in marketing, but because Jayco could not get sufficient machines to allow it to market normally. The biggest item in the break-up between Jayco and Jerry Andreff in the Spring of 1976 was the refusal of Savin to agree to provide machines should Jayco get the State of Texas bid. Jerry Andreff went with Jayco in the beginning with the idea of capturing much of the State of Texas photo-copier business. When it became evident that sufficient supplies would not be available, Mr. Andreff decided to leave and attempt to find other lines with which to do business. Had it not been for a refusal of Savin to deal with Jayco in connection with the State business and the tremendous financial burden

of the Savin 300's, there is no indication whatsoever that Mr. Andreff would ever have left Jayco.

6. "Jayco did have an interest in obtaining the State of Texas business, but could not do so without an agreement from Savin to provide the necessary machines.

7. "I am experienced in the State of Texas photocopier business, and know that several statements made by Savin in connection with that business are totally false. First, if a rental bid had ever been obtained by Jayco and subsequently lost, no machines "automatically" would have gone back to Jayco. All machines placed would simply have been put up for a renewal bid. It was not unusual for an agency to continue to renew a machine should it continue to properly per-

form at a reasonable price. In fact, many other makes of machines were renewed in 197[illegible] by various state agencies, despite the fact that Savin obtained the rental bid. Statements to the effect that Jayco could not have afforded to take the machines back are also false. Because machines were in extremely tight supply, Jayco had a ready market for each and every machine it could get its hands on. No financial burden would have been incurred as a result of a return of a particular machine.

8. "The suggestion that Jayco did not have sufficient financial support is also totally false. Jayco had entered conversations with its commercial loan officer specifically about the subject of expanding the rental fleet. It was my opinion that

over the long run a rental fleet would be extremely profitable, and my Banker agreed to support me if I felt comfortable with the model I could obtain. Savin would not allow me to obtain the Savin 700 series copiers in sufficient supply, and through approximately 1979 to 1980, there was no machine which offered even comparable reliability or dependability. Thus, the subject was never effected. However, had Savin agreed to provide the machines and to allow Jayco to bid, I would have used the credit which would have otherwise been provided by my Banker.

9. "My Banker has reviewed the financial history of the State of Texas business, and would have extended the necessary credit to support the State of Texas business. He would have, however, required me to

pay a substantial amount of Jayco's earnings against the indebtedness, rather than to continue to finance at 100%. That would have placed no burden upon Jayco, as it was my practice to attempt to retire debts as soon as possible. The only reason 100% financing has been assumed is to insure that profits were not overstated in the model of Touche Ross & Co.

10. "Jayco had the financing available, and Jayco's Banker, who was in the commercial lending department of one of the largest Banks in Dallas would have given the financial support.

11. "Jayco did have the capability to service a statewide system of machines. In determining whether or not other Savin Dealers would service a State of Texas

machine if in its marketing area, Jayco ran into no resistence. Jayco simply was unable to follow through because Savin would not provide the machines.

12. "Jayco also had trained dealers all over the state to handle its statewide distribution of Canon machines in 1975. Training statewide locations to take care of the Savin 700 series was a rather simple task, as that machine was substantially less complex than the Savin 300 series machine or a similar model. Moreover, the Savin 700 series machines have proven to require a minimum of servicing. There was no indication to anyone at Jayco in late 1975 or early 1976 that finding service locations for any machines would be of any difficulty.

13. "There were also misstatements

concerning the number of machines that Jayco would have had to purchase in order to obtain the State of Texas bid. The first year's state records revealed that approximately 400 Savin machines were put on the state rental contracts. This is a far cry from having to purchase outright thousands of machines as Savin indicates in its brief. The addition of machines was a gradual process during which earnings from other machines would have been utilized to pay off debts. Again, had any machines come back to Jayco, the event would have been welcomed, and Jayco would have benefitted from the tax benefits, the rental income received and the ability to re-rent or sell the machines which was in tight supply until 1978.

14. "The indiction in the brief that

EXHIBIT I

Jayco did not desire to continue as a Savin dealer is manifestly untrue. Savin kew that it had the most desirable machine in the marketplace, and that Jayco needed to continue as a dealer in order to correct financial problems encountered with the Savin 300 series. Jayco never indicated that it had no desire to continue as a Savin dealer. The Savin dealership was a "door opener" in view of the fact that Savin had the machine which by 1979 was outplacing Xerox and IBM combined. Savin became number one in the nation in approximately three years. The growth was phenomenal, and Jayco wanted to be part of that growth. Jayco was not renewed because it was a price cutter, refused to become part of a non-competition agreement among competitors in the Territory and refused to par-

ticipate in the State of Texas anti-trust network set up by Savin. Jayco wanted to be an independent business and operate honestly. That made simply did not fit the Savin plans in the State of Texas. Savin had no place for a price cutter or a truly independent businessman.

15. "Savin also participated in a price-fixing and non-competition agreement among the Savin branch and other Savin dealers in Dallas. I read the letter produced by Savin from a local Savin Dealer in which the conspiracy was expressly set forth therein. I was invited by that particular Dealer to participate in a pricing arrangement, and refused to do so. Savin has a copy of that letter, and my attorneys do also.

16. "Jayco also would have desired

to participate in open market purchase requests, but was not allowed to participate in the State of Texas business other than through the Savin conspiracy. Savin did not allow its dealers to compete with the Savin-Uni-copy combination in Austin. This was simply a part of Savin's general discipline of its dealers who attempted to utilize their own inventories for national accounts. Savin chastised and admonished dealers who attempted to market independently. I have seen letters from Mr. Art Nendick of Savin and Mr. Rod Marcoux of Savin which explicitly set forth condemnation of a dealer who attempted to utilize his own machines in national accounts. I was aware of Savin's policy of strongly disapproving of dealer competition with the corporate plans.

EXHIBIT I

I was aware of Savin's policy which precluded dealers from competing for the State of Texas business. I was aware of the policy described by Mr. Neil Henricksen in his deposition. I was aware that I could participate in the State of Texas business only if I became part of Savin's combination. I refused to become part of a price-fixing combination and Savin refused to deal with me."

Further, Affiant Sayeth not.

By: James Woznick

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 4th day of May, 1983.

Susan L. Keeling
NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

(3)

Supreme Court, U.S.
FILED
APR 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1856

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAYCO SYSTEMS, INC.,

Petitioners,

v.

SAVIN BUSINESS MACHINES CORPORATION

Respondent.

APPENDIX II TO THE PETITION FOR WRIT OF CERTIORARI EXHIBITS J — O

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EXHIBIT J

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK Plaintiffs, V. SAVIN BUSINESS MACHINES CORPROATION, Defendant, V. AMERICAN BUSINESS PRODUCTS, INC., Third-Party Defendant	§ § § § § § § § § § § § § § § § §	CIVIL ACTION NO. 3-78-0060-H

AFFIDAVIT OF JERRY M. ANDREFF

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared JERRY M.

ANDREFF, known to me and who being by me duly sworn on oath sated:

"My name is Jerry M. Andreff, and I am the son-in-law of Mr. and Mrs. James Woznick, who are the owners of Jayco Systems, Inc.

"In the fall of 1974 I personally participated in the negotiations which lead to the initiation of operations as the Savin bond copier authorized dealer in Dallas, Tarrant, Collin and Ellis Counties area. At that time I was serving as a vice president of Jayco Systems, Inc.

"In early 1976 Jayco was first advised that the Savin Branch would be again opening up its operations for the sale of the new bond copier, only. Jayco was also notified that other independent dealers would

be appointed in the Territory. These actions were taken contrary to Savin's agreement to assist Jayco, not compete with Jayco, for three years, and Savin's promise not to appoint any additional bond copier dealers in the Dallas, Tarrant, Collin and Ellis Counties Territory.

"From the initiation of operation in November of 1974, Jayco Systems, Inc. intended and participated in State of Texas copier rentals and sales. One of the major objectives of Jayco was to obtain substantial State of Texas business, as well as that of the surrounding states, upon which a secure foundation could be laid for the development of a substantial dealership. I, personally, had extensive experience in dealing with governmental entities, and particularly the

State of Texas.

"In 1975, on behalf of Jayco Systems, Inc., I bid for the sale of 60 Cannon copiers to the State of Texas. Because the bid required an '11 x 17' capability which the Savin machines did not have, I bid the Cannon machines. That bid was successful, and was a profitable venture for Jayco Systems, Inc.

"In 1975 I also advised Mr. Art Nendick, a vice president of the Savin Corporation, that Jayco would be submitted a bid for supplying the Savin 750 series bond copiers to the State of Texas on many of its contractual categories. Mr. Nendick initially indicated some interest in assisting Jayco, requested that I introduce him to the purchasing agents and other decision-making

people for the State of Texas, and indicated no particular problem with Jayco obtaining its objective.

"Shortly thereafter, on discussing further Jayco's plan for developing the State of Texas bond copier rental contract, Mr. Nendick advised me that Savin would not either sell or supply any Savin 750 bond copiers to satisfy any State of Texas rental contract. On asking why Savin had taken such a position, Mr. Nendick replied that there were not sufficient machines available to support such a bid, although he would advise Jayco when and if Savin could support a Jayco bid on the State of Texas bond copier rental contract. Just prior to leaving Jayco Systems, Inc. in early 1976, I again questioned Mr. Nendick on the feasibility of

a State of Texas bid on the bond copier rentals of the upcoming 1976-1977 bid year. Mr. Nendick replied that Savin would not provide any machines for such a bid by Jayco, and refused to discuss the matter any further. Mr. Nendick left me with the distinct impression that Savin would not supply machines under a rental contract between Jayco and the State of Texas, and that no bid on Savin bond copiers would be made for the year 1976-1977.

"Had Savin not refused to deal with Jayco in connection with the State of Texas bond copier rental contracts, Jayco would have made such a bid, and was ready, willing and able, both administratively and financially, to handle such a project. With my background in major account marketing and

governmental bids, in general, I feel certain that I would have underbid the Savin Corporation in order to obtain the State of Texas bond copier rental contracts. Bidding under the price actually bid by the Savin Corporation would have allowed Jayco to recover its investment in 18 to 24 months.

"The only reason for Jayco not obtaining the State of Texas bid in July of 1976 is the absolute refusal of the Savin Corporation to deal with Jayco.

"After leaving Jayco in 1976 and forming my own business, Copy Systems, Inc., I continued to nurture business with the State of Texas. Due to unfavorable circumstances, Copy Systems, Inc. was forced to file a petition in Bankruptcy.

"Because of the Bankruptcy of Copy

Systems, Inc., I was employed by the Savin Corporation to assist, hire and train personnel in the handling of major account marketing with the Dallas Savin Branch. I was employed on or about November of 1977 and worked with the Savin Corporation until approximately September of 1981, almost four years later.

"During my employment with Savin from 1977-81, I was intimately familiar with the operation of the branch under the management of both Mr. Art Felcoff, the former Branch General Manager, and Mr. Tony Pinto, the current Branch General Manager.

"I have reviewed the deposition of Mr. Art Felcoff which has been taken in this case. From my review of the deposition, I know of my own personal knowledge that Mr.

EXHIBIT J

Felcoff is correct in stating the following:

(a) that Mr. Felcoff destroyed documents which he feared reflected antitrust violations. I personally viewed the paper shreader which was utilized in his office. I also viewed the shreaded paper on the floor of the office;

(b) that Mr. Felcoff did advise all sales people to do whatever they had to do to beat a dealer, no matter what the cost. Mr. Felcoff advised his sales force that the only limitation on competition with the independent Savn dealers was loosing -- we were not to lose

a dale to a dealer. Otherwise, 'anything goes.'

(c) that Felcoff did admit having exchanged pricing information with independent Savin dealers in the Dallas-Fort Worth area. Meetings were held to attempt to lessen the price competition which was resulting from so many sellers of Savin products in one Territory. The competition was extremely keen because there existed no other meaningful competition in the low-price range for Savin 700 series copiers until late 1979 or 1980. In 1977, 1978 and most of 1979 the only com-

petition for the Savin Branch was other Savin dealers in the area.

(d) that Felcoff received numerous complaints from sales personnel that Jayco Systems, Inc. was a price-cutter, resulting in prices so low that Branch commissions were unsatisfactory. At numerous morning sales meetings, significant complaints were lodged about the price competition from Jayco. Of course, from time to time, there were complaints about pricing from other dealers as well.

(e) prior to the termination of

Jayco Systems, Inc., by Savin, I was aware of numerous rumors passing through the personnel at the Branch to the effect that Jayco was being terminated because it would not 'play along with the boys in New York,' because of financial hardship, inability to service machines, skating hot machines, and existing legal disputes with Savin over the Savin 300 series copiers. I also know that various sales people admitted utilizing desparaging remarks about Jayco as a matter of course in their sales presentation when competing with

Jayco.

"Both Art Nendick and Harry Farnham on numerous occasions before and after execution of the contract confirmed to Jayco that Savin was getting out the bond copier business in the Dallas Territory, and that Savin would support Jayco in whatever manner was reasonable. In the spring of 1976 I learned that the Savin Corporation was going to reestablish a Branch operation and that Savin was appointing additional bond copier dealers in violation with their contracts with us. Mr. Woznick and I were advised by Mr. Nendick and Mr. Marcou that the decision had been made by Savin management and that the new dealers and Branch would simply be a fact of life with which Jayco would have to deal, despite Mr. Nendick's promises and the writ-

ten agreements to the contrary.

"Had Mr. Nendick, my long-time friend and former associate at Saxon business Products, revealed to me in the fall of 1974 the actual capacity and capability of the poor Savin 300 copier, the fact that despite the oral agreements and written agreements that Savin would return to the Territory within three years if it so desired, that Jayco would be restricted from developing a strong State of Texas business, and other matters which were extremely important to the decision to purchase the Dallas Branch operations, I would never have recommended to my in-laws that they purchase the Dallas operations. The sum of the parts reveals that Savin dumped its poor 300 series copiers off on Jayco, and reaped the benefits on the 700

series copiers at the expense of any dealer, particularly Jayco, who got in the way.

"Further, Affiant sayeth not."

/s/ Jerry M. Andreff
JERRY M. ANDREFF

SUBSCRIBED AND SWORN TO this 7th day of January, 1982.

/s/ Virginia D. Willis
Notary Public in and for
The State of Texas

My Commission Expires: 2-2-85

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Affidavit of Jerry M. Andreff has been forwarded to counsel for Defendant, this 7th day of January, 1982.

/s/ Samuel L. Boyd
SAMUEL L. BOYD

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK Plaintiffs,	§	
V.	§	CIVIL ACTION NO. 3-78-0060-H
SAVIN BUSINESS MACHINES CORPROATION, Defendant,	§	
V.	§	
AMERICAN BUSINESS PRODUCTS, INC., Third-Party Defendant	§	

AFFIDAVIT OF ROBERT MAYES

THE STATE OF TEXAS §
§
COUNTY OF EL PASO §

BEFORE ME, the undersigned authority, on this day personally appeared

EXHIBIT K

ROBERT MAYES, who, after being first duly sworn, stated under oath that the following statements are within his own personal knowledge and are true and correct:

1. My name is Robert Mayes. I am over the age of 18 years, of sound mind and capable of making this Affidavit.

2. "I am presently a photocopier dealer for the Ricoh brand. Ricoh was the manufacturer of the extremely successful Savin liquid toner bond copiers. It now sells copiers in competition with Savin.

3. "I was formerly a Savin dealer in Austin, Texas. There, I was a part owner of Modern Methods which acquired a Savin dealership in 1975. That dealership was later sold in late 1976 to Mr. Lou Scantland, who at that time owned Uni-Copy, another

Savin dealership, in Houston, Texas.

4. "Subsequent to my departure from Modern Methods, I again associated with Savin when I was at Columbia Business Systems, a Savin dealership in Corpus Christi, Texas. At Columbia, I first served as Sales Manager and ultimately served as its President.

5. "While I was associated with Modern Methods, the Austin Savin dealership, in 1975, I intended to bid the Savin 300 Series bond copiers for the annual State of Texas rental contract for the 'Austin Zone'. However, I did not do so at the request of Savin corporate employees who were afraid that the Savin 300 copiers would 'sour the State on Savin.' I was aware that Jerry Andreff of Jayco Systems, Inc. in 1975 submitted a copier bid for the State of Texas

annual rental contracts. As I recall, he bid the Savin 300 Series copiers. His bid utilizing the Savin 300 Series was, apparently, not accepted.

6. "In 1975, I first learned about the Savin 700 Series plain paper bond copiers. The Savin 700 Series were bond copiers vastly superior to anything that Savin had previously produced and to any copiers then on the market that they might have been considered as competitors. My company, Modern Methods was interested in bidding the Savin 700 Series copiers to the State of Texas. The copier appeared to be outstanding insofar as its reliability and dependability in the price range in which it was offered; because of these characteristics there appeared to be a very good chance of

obtaining State of Texas copier business with these machines. Because of supply and allocation problems, we could not submit bids to the State of Texas until Savin confirmed that the machines would be made available if we were successful. After confirmation of allocation from Mr. Art Nendick, a Vice President of Savin, we successfully bid for two open-market purchases in 1975. One contract involved the sale of a single machine, and the other involved a sale of approximately 25 Savin machines. Subsequent to those two successful sales, Savin entertained more serious discussions with Modern Methods in connection with the possibility of substantially increased State business. We had requested that they commit to providing the necessary machine allocations in order that we could

bid for the State of Texas business for our zone, in and about Austin. Initially we were assured by Mr. Nendick that there would be no problem in this regard. We proceeded to have talks with various State officials, including Trent Fowler and later Robert Schneider, concerning bids for the State's bond copier business. I took the opportunity, at the request of Mr. Nendick, to introduce him to the various State officials in order that the State might feel assured of Modern Methods' capability to perform under a State copier contract.

7. "In initial meetings with Mr. Nendick, he reassured me that Savin was interested in looking into the State business from the standpoint of providing inventory from which we could successfully fulfill a

bid if we received one from the State. At no time in the initial stages did Mr. Nendick ever indicate that Savin was interested in reserving the bid for itself, or in excluding the dealers from bidding.

8. "As the 1976 bid opening for bond copier rentals approached, Mr. Nendick made several visits to Austin where he met privately with Mr. Fowler. Mr. Fowler was the State official whom we had to sell in order to get the contracts, and the individual who made the ultimate recommendation for the bids awarded.

9. "The night before the 1976 annual rental contract bid opening, myself, my partner, Mr. Neil Henriksen, Savin's Regional Manager, Mr. Nendick and Mr. Fowler dined and drank beer at an outdoor restaurant

known as Convict Hill in Austin. It was sort of a pre-bid opening celebration. Mr. Fowler seemed very happy and confident for us. Even as late as the night before the bids were to be opened, I still felt that Modern Methods would be bidding the Savin machines for the Austin zone which we served. I was unsure how the remainder of the zones would be handled, but I did not expect that we would be able to bid that business.

10. "I was informed by Art Nendick the next morning, prior to the bid opening, that only Savin would be submitting the bids for the machines, rather than Modern Methods or any other dealers. I was told that in return for my cooperation and help, that Modern Methods would be granted (1) a service fee for each machine that would be installed

under the State contract, and (2) the right to bid the toner and dispersant on the supply bid. I was not given a choice on the matter, despite the fact that I had made known to Mr. Nendick for a substantial amount of time that Modern Methods intended to bid the machine contracts itself and that I had been advised that Savin had agreed to supply us with the machines needed for this bid. As a Savin dealer, however, I realized that the machine allocation controls possessed by Savin controlled the ultimate welfare of my business. Modern Methods had no alternative but to go along with whatever Savin wanted. I had no doubt that if we had competed with Savin we would have been cut off from an allocation of 700 Series copiers, whether for the State of Texas contract or for our other

markets. I knew from Mr. Nendick that bidding against Savin could have resulted in the termination of our Savin dealership. To fail to have cooperated with Savin would have been a financial disaster. On behalf of Modern Methods, I reluctantly agreed to go along with Mr. Nendick's arrangement for the State copier business.

11. "Savin had no capability to service the State of Texas copier business without our cooperation, particularly as well as the cooperation of other Savin dealers. For instance, at the time of the bid opening in June of 1976, Savin had no service capability within the State of Texas, had no sales representatives capable of marketing the machines to the State agencies within the State of Texas, and virtually had no cor-

porate presence. Without the cooperation of the independent Savin dealers, Savin could not have successfully bid and fulfilled the bond copier contracts. Yet we needed nothing from Savin but machines allocations to service the State copier business.

12. "Several weeks later, I learned that Savin had also placed a bid for the toner and dispersant business at G.S.A. pricing. That pricing of $45.00 was too high. I learned from Mr. Marcoux and Mr. Nendick that Savin's bid for toner and dispersant caused the State's 'cost per copy formula' to reflect that Savin was not the low bid on the State contract. The State calculated cost per copy on the basis of the rental prices and the cost of supplies (i.e., toner and dispersant) used to make those

copies in order to determine the low, winning bidder. Although specific numbers were not mentioned, I was informed by Mr. Rod Marcoux of Savin that a lower toner and dispersant bid would have to be submitted in order for Savin to get the copier rental contract it had bid. I was not certain of the exact price at that time, but I knew that additional bids would have to be submitted, or Savin would not receive the contract award. In fact, based upon the bids submitted, Mr. Marcoux stated that Saxon was actually the low bid on the contract.

13. "Subsequent to Mr. Marcoux's conversations with me, Savin set up a dealer meeting in Austin, Texas, in August of 1976. The apparent purpose of that meeting was for Savin and Mr. Fowler to explain to the

dealers the manner in which the State of Texas business would be administered, as well as to secretly coordinate a toner and dispersant bid plan by which some of the dealers which would rebid Savin supplies in order to make the Savin contract the 'low bid' under the State's 'cost per copy' formula.

14. "In connection with these supplemental dealer bids on toner and dispersant, I contacted Mr. Fowler, who was at that time serving with the State Auditor's Office, and he informed me what the cost per copy had to be in order for Savin to be the low bidder and to be awarded the copier contract. I relayed this information to Savin, and the price at which toner and dispersant was to be jointly bid by the participating dealers was determined for us by Savin. I do not know

why Savin decided not to resubmit a bid.

15. "Although Modern Methods had originally been promised all the toner and dispersant business, Mr. Nendick later advised me that he was concerned about the reaction that other Savin dealers might have if Modern Methods received most of the benefits which were given to the dealers under the arrangement, and he requested that Modern Methods share the toner and dispersant bid with a few other dealers. There was, however, a pricing problem in connection with the supplemental bids, because the price at which the dealers were told to bid would not allow a reasonable profit margin if Savin sold those supplies to us at its normal wholesale price. To dispense with this problem, Savin sold toner and dispersant to the three

cooperating dealers, who were to bid the supplies, at a price far below the lowest price available to other dealers. Modern Methods and the other two bidders were able to purchase toner and dispersant at those prices for other uses as well. As I recall it, the price was approximately $9.00 per TD Pak less than the lowest dealer cost. This gave us a nice price advantage over all other Savin dealers in our day-to-day business, as well as in connection with the State business.

16. "Once we were told the price to bid, and decided upon the division of the State territorial zones, I drove myself, Lou Scantland and Jim Quisenberry over to State Purchasing's business office. We went to that office for the purpose of obtaining bid

forms, and we sat down together and wrote out the bids by hand for submission and opening that morning. All three dealers, with the approval of Savin, agreed on territories we would serve, and the prices at which we would bid the toner and dispersant. Other Savin dealers were not allowed to bid, nor were they invited to do so. Without the willing assistance of the bidding Savin dealers, Savin would not have been able to obtain the copier rental contract that year, because its original bid was not the 'low bid'. According to Messrs. Fowler, Marcoux and Nendick, that without our bids being submitted in cooperation with Savin, Saxon would have received the contract. The bids are attached hereto as Exhibit "A."

17. "At the dealer meeting in August

of 1976, Mr. Nendick and Mr. Marcoux related to the assembled Texas dealers that all Savin equipment bids to the State of Texas were to be placed through the Austin Savin dealer. It was made extremely clear that no competitive bidding would be tolerated, and that anyone who tried to 'rock the boat' would find himself unable to obtain machines or supplies for other copier business. This policy was continuously related and enforced by Mr. Stutes, Mr. Henriksen, Mr. Marcoux and Mr. Nendick. Simply put, although other dealers could have effectively competed with Savin or the Austin Savin dealer, none of them did, because of the coersion exerted by Savin upon us all.

18. "The manifested threat of termination was sufficient to keep the indepen-

dent Savin dealers "in line" in connection with the State business.

19. "By 1977, I had left Modern Methods and associated with Columbia Business Systems in Corpus Christi, Texas. This Savin dealership could not purchase Savin supplies at the special low prices that Savin gave to the three dealers bidding the State of Texas supply contracts, and thus, I could not make a competitive bid to sell the State of Texas the Savin toner and dispersant it needed. Thus, at Columbia Business Systems, I began nurturing a relationship with Nashua, a manufacturer of competitive toner and dispersant for Savin copiers, in order to submit a bid to sell Nashua's toner and dispersant to the State of Texas for Savin copiers. I was personally informed by Savin corporate represen-

tatives, including Mr. Henriksen, that if I made a bid for toner and dispersant in competition with Savin or its dealers, that I would be terminated as a Savin dealer. Because of this threat, I did not bid the Nashua toner and dispersant which I knew would be compatible with Savin copiers at a price that would have been competitive with the prices bid by the cooperating Savin dealers. On the other hand, I would have been happy to bid Savin toner and dispersant had I been granted the same price advantage which was being enjoyed by Mr. Scantland and Mr. Quisenberry. No one could compete with them because of the price level at which they could acquire toner and dispersant from Savin.

20. "Because of the unique qualities

of the Savin plain paper bond copiers in 1977, I was unable to obtain other lines of machines which would be, in fact, competitive with the Savin copiers. There was simply no machine in the price range of $6,000.00 that was as dependable as the Savin 700 Series copiers. Although other manufacturers were producing machines with of the same general characteristics, none were actually competitive with the Savin machine. In fact, the only competition I encountered as a Savin dealer was from other Savin dealers or the Savin Corporation. It was not until approximately 1979 that competitive machines even began to provide any meaningful challenge to the Savin products in the general marketplace. The Savin group retained control of the State of Texas copier market,

however.

21. "During my time as a Savin dealer, I was also expressly forbidden to buy toner and dispersant for my Savin machines from manufacturers other than Savin. Savin Corporation representatives, including Mr. Stutes and Mr. Henriksen, constantly scrutinized us to determine whether or not we were substituting toner and dispersant of other manufacturers for Savin toner and dispersant. I was aware of lower priced toner and dispersant in the market which were compatible with the Savin 700 Series copiers. I would have enjoyed the higher profits and probably been able to provide lower prices to my customers by the use of these substitute toners and dispersants. However, because of the threat of termination as a Savin dealer, I did not

take advantage of these other products.

22. "The Savin Corporation was not shy about informing us that the use of toners and dispersants from other manufacturers would result in termination. I personally recall being so warned by Mr. Robert Low, then the President of Savin, in California at a Dealers' Council meeting. He was extremely candid in advising us that the purchase of competing toners and dispersants would result in termination. This was approximately 1977. This policy had earlier been expressed by Savin's corporate representatives in the State of Texas, but I had not previously heard it from the mouth lips of the President of the Savin Corporation.

23. "I also knew at the time that Savin submitted the 1976 bid for the bond

copier rental contracts that Jayco Systems, Inc., principally through Mr. Jerry Andreff, had been developing a relationship with the State in order that they could bid the Savin machines on some basis. I was not aware of the specific territory that Jayco intended to bid, nor was I aware of the pricing that they were considering. I did, however, know that Jerry Andreff, the Vice President of Jayco, had extensive experience in the State of Texas copier business. I knew that he had managed the State of Texas contract for Saxon prior to joining Jayco in Dallas. I never personally knew why Jayco did not submit a bid. The only reason Modern Methods did not submit a bid was because we were told by Mr. Nendick that Savin, rather than the dealers, he would submit the bid for machines. I have

subsequently learned that Jayco also complained of the same refusal of Mr. Nendick to allocate any machines for any State contract which Jayco might have received.

24. "Simply stated, Savin precluded competition for the State of Texas copier business by virtue of its total control over the allocations of Savin machines. Serious allocation problems existed until at least late 1978. Savin and its dealers controlled the rental bids, as well as the open-market purchases of machines and supplies very easily during that timeframe. Savin representatives also made it plain that no actual price or other competition with the Savin or the Austin Savin dealer would be tolerated on any aspect of the State copier business. The Savin dealers were willing participants in

this arrangement, because of the large profits which they received for going along without 'rocking the boat.' The absence of price competition allowed all of us to split higher profits with each other. Price competition would probably have resulted in lower profits, or no profits, to us by virtue of: (1) the lower prices paid by the State, and (2) the absence of the "Savin cartel" which guaranteed revenues to those who agreed not to compete. It profited all of us to cooperate with Savin's policy of 'non-competition in the State copier business;' particularly, in view of the outstanding threats of termination.

25. "Finally, Savin officials made us aware of instances in which individuals attempted to bid against the Austin Savin

dealer. Mr. Henriksen told me that Mr. Bill Jones in El Paso had attempted to bid against Uni-Copy in Austin, and that he, Mr. Henriksen, had threatened him with termination. I was also aware of a dealer in the Texas panhandle who threatened Savin's pricing control, and was also rebuked by Mr. Henriksen.

26. "The State of Texas overpaid for its purchases of Savin equipment, once the machines became more plentiful. The State was paying $4,600.00 or more per Savin copier at a time when the same machines were able to the general retail public for $4,000.00 or less per machine. The Savin price-fixing arrangement was profitable, for the Savin cartel and costly for the State of Texas.

27. "Once I was with Columbia, I

would have competed with Savin, and its Austin dealer, had I not been worried about having my dealership in Corpus Christi terminated. Savin's special relationship with Mr. Fowler and its unique product provided the market power which allowed it to totally dominate the State of Texas copier market, particularly for contracts under 75,000 copies per month. Savin controlled machine allocation, pricing, competition and dealer conduct. While it was very beneficial for those who participated, the citizens of the State of Texas did not benefit from the Savin coalition."

Further, affiant sayeth not.

/s/ Robert Mayes
ROBERT MAYES

SUBSCRIBED AND SWORN TO BEFORE ME on

this the 21st day of February, 1984.

/s/ Doris Janice Lea
NOTARY PUBLIC in and for
the State of Texas

My commission expires:

11/9/85

EXHIBIT K

BID INVITATION

S T A T E O F T E X A S

CLASS 015

COPYING, SUPPLIES, SAVIN 750

BIDS OPEN: 11:00 a.m., August 10, 1976

Estimated requirements for all State Agencies for the period beginning September 1, 1986 and ending April 30, 1977.

BID OF

Modern Methods, Inc.
NAME OF BIDDER

5555 N. Lamar, Suite E-111
STREET OR BOX NO.

Austin, Texas 78751
CITY OR TOWN

/s/ Robert Mayes 8-10-76
SIGNED BY

SUBMIT BID PROPOSAL TO

STATE BOARD OF CONTROL
P.O. Box 13047 CAPITOL STATION
Austin, Texas 78711

EXHIBIT K

Bids Mailed: July 27, 1976

EXHIBIT K

STATE BOARD OF CONTROL
Austin, Texas

PROPOSAL

State Board of Control
Austin, Texas

Gentlemen,

I - We - propose to furnish and deliver any and all of the supplies named in this schedule, opposite which prices have been set. The price or prices offered herein shall apply for the period of time stated in this schedule.

I - We - further agree to strictly abide by all the terms contained in "General Instructions, Terms and Conditions to Bidders" which are made a part hereof, in addition to the terms, conditions and specifications embodied in this pamphlet.

EXHIBIT K

It is understood and agreed that these bids shall constitute an offer, which when accepted in writing by the State Board of Control, and subject to the terms and conditions of such acceptance, will constitute a valid and binding contract between the undersigned and the State of Texas.

It is further understood and agreed that the State reserves the right to extend the contract period covered by any contract award, resulting from these bid proposals, a maximum of ninety (90) days beyond the normal expiration date of such contract.

By my - our - written signature on the PROPOSAL, we guarantee and certify that all items included in this bid meet or exceed any and all State Specifications covering such

items. I - We - further agree, if awarded a contract, to deliver on each order merchandise which meets or exceeds the specifications.

By the signature hereon affixed, the bidder hereby certifies that neither the bidder nor the firm, corporation, partnership, or institution represented by the bidder, or anyone acting for such firm, corporation, or institution has violated the antitrust laws of this State, codified in Section 15.01, et. seq., Texas Business and Commerce Code, or the Federal antitrust laws, nor communicated directly or indirectly the bid made to any competitor or any other person engaged in such line of business.

MAIL ORDER TO:
(If different from address shown on Person, Firm, or Corp.) Modern Methods, Inc.

EXHIBIT K

face of bid)

Modern Methods, Inc Firm	5555 N. Lamar P.O. Box or Street No.
5555 N. Lamar, E-111 P.O. Box or Street No.	Austin, Texas 78751 City, State, Zip Code
Austin, Texas 78751 City, State Zip	/s/ Robert Mayes Signed By Title: Vice President Date: 8-10-76

IMPORTANT: This proposal must be manually signed in ink. Entries of bid prices shall be made with ink or typewriter.

EXHIBIT K

SMALL ORDERS: Agencies will pay transportantion charges on all orders which have a NET total of less than $25.00.

Samples for testing may be required. Samples will be tested by one or more agencies selected by the Board of Control.

The State reserves the right to buy from another source if it is evident the contracted supplies will not serve the needs of any agency on a certain article or service. This shall not be construed as a failure of the contractor to perform his contract nor as a breach of contract by the Board of Control.

THIS IS A "NET OR FIRM PRICE" TYPE OF BID.

NOTE: Complete the "Type or Number" column

EXHIBIT K

only if your number is different from that shown in the description.

FOR ZONES 1 & 2 ONLY

015-80-06

DISPERSANT AND TONER, SAVIN 750 COPIER

BRAND OR MPG Savin CASH DISC 0 % 0 DAYS

8 QTS IDSPERSANT and two Bottles 600 cc Toner with 2 Toner Valves

per case 36.00 case

This Bid supercedes all other Modern Methods Bid for Class 015-80-06.

/s/ Robert Mayes

EXHIBIT K

BID INVITATION

S T A T E O F T E X A S

CLASS 015

COPYING, SUPPLIES, SAVIN 750

BIDS OPEN: 11:00 a.m., August 10, 1976

Estimated requirements for all State Agencies for the period beginning September 1, 1986 and ending April 30, 1977.

BID OF

Universal Copy Systems, Inc.
NAME OF BIDDER

2750 Northaven Suite 107
STREET OR BOX NO.

Dallas, Texas 75229
CITY OR TOWN

/s/ James Quisenberry Aug. 10, 1976
SIGNED BY

SUBMIT BID PROPOSAL TO

STATE BOARD OF CONTROL
P.O. Box 13047 CAPITOL STATION
Austin, Texas 78711

EXHIBIT K

Bids Mailed: July 27, 1976

EXHIBIT K

STATE BOARD OF CONTROL
Austin, Texas

PROPOSAL

State Board of Control
Austin, Texas

Gentlemen,

I - We - propose to furnish and deliver any and all of the supplies named in this schedule, opposite which prices have been set. The price or prices offered herein shall apply for the period of time stated in this schedule.

I - We - further agree to strictly abide by all the terms contained in "General Instructions, Terms and Conditions to Bidders" which are made a part hereof, in addition to the terms, conditions and specifications embodied in this pamphlet.

EXHIBIT K

It is understood and agreed that these bids shall constitute an offer, which when accepted in writing by the State Board of Control, and subject to the terms and conditions of such acceptance, will constitute a valid and binding contract between the undersigned and the State of Texas.

It is further understood and agreed that the State reserves the right to extend the contract period covered by any contract award, resulting from these bid proposals, a maximum of ninety (90) days beyond the normal expiration date of such contract.

By my - our - written signature on the PROPOSAL, we guarantee and certify that all items included in this bid meet or exceed any and all State Specifications covering such

items. I - We - further agree, if awarded a contract, to deliver on each order merchandise which meets or exceeds the specifications.

By the signature hereon affixed, the bidder hereby certifies that neither the bidder nor the firm, corporation, partnership, or institution represented by the bidder, or anyone acting for such firm, corporation, or institution has violated the antitrust laws of this State, codified in Section 15.01, et. seq., Texas Business and Commerce Code, or the Federal antitrust laws, nor communicated directly or indirectly the bid made to any competitor or any other person engaged in such line of business.

MAIL ORDER TO:
(If different from address shown on

Universal Copy Systems
Person, Firm, or Corp.

face of bid)

Universal Copy	2750 Northaven #107
Firm	P.O. Box or Street No.
	Dallas, Texas 75229
2750 Northaven #107	City, State, Zip Code
P.O. Box or Street No.	
	/s/ James Quisenberry
Dallas, Texas 75229	Signed By
City, State Zip	Title: President
	Date: 8-10-76

IMPORTANT: This proposal must be manually signed in ink. Entries of bid prices shall be made with ink or typewriter.

EXHIBIT K

SMALL ORDERS: Agencies will pay transportantion charges on all orders which have a NET total of less than $25.00.

Samples for testing may be required. Samples will be tested by one or more agencies selected by the Board of Control.

The State reserves the right to buy from another source if it is evident the contracted supplies will not serve the needs of any agency on a certain article or service. This shall not be construed as a failure of the contractor to perform his contract nor as a breach of contract by the Board of Control.

THIS IS A "NET OR FIRM PRICE" TYPE OF BID.

NOTE: Complete the "Type or Number" column

EXHIBIT K

only if your number is different from that shown in the description.

FOR ZONES 3 & 4 ONLY

015-80-06

DISPERSANT AND TONER, SAVIN 750 COPIER

BRAND OR MPG Savin CASH DISC 0 % 0 DAYS

8 QTS IDSPERSANT and two Bottles 600 cc Toner with 2 Toner Valves

per case 36.00 case

EXHIBIT K

BID INVITATION

S T A T E O F T E X A S

CLASS 015

COPYING, SUPPLIES, SAVIN 750

BIDS OPEN: 11:00 a.m., August 10, 1976

Estimated requirements for all State Agencies for the period beginning September 1, 1986 and ending April 30, 1977.

BID OF

UNI-COPY CORPORATION OF TEXAS
NAME OF BIDDER

5808 Parkersburg
STREET OR BOX NO.

Houston, Texas
CITY OR TOWN

/s/ Louis Scantland 8/10/76
SIGNED BY

SUBMIT BID PROPOSAL TO

STATE BOARD OF CONTROL
P.O. Box 13047 CAPITOL STATION
Austin, Texas 78711

EXHIBIT K

Bids Mailed: July 27, 1976

EXHIBIT K

STATE BOARD OF CONTROL
Austin, Texas

PROPOSAL

State Board of Control
Austin, Texas

Gentlemen,

I - We - propose to furnish and deliver any and all of the supplies named in this schedule, opposite which prices have been set. The price or prices offered herein shall apply for the period of time stated in this schedule.

I - We - further agree to strictly abide by all the terms contained in "General Instructions, Terms and Conditions to Bidders" which are made a part hereof, in addition to the terms, conditions and specifications embodied in this pamphlet.

EXHIBIT K

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It is further understood and agreed that the State reserves the right to extend the contract period covered by any contract award, resulting from these bid proposals, a maximum of ninety (90) days beyond the normal expiration date of such contract.

By my - our - written signature on the PROPOSAL, we guarantee and certify that all items included in this bid meet or exceed any and all State Specifications covering such

items. I - We - further agree, if awarded a contract, to deliver on each order merchandise which meets or exceeds the specifications.

By the signature hereon affixed, the bidder hereby certifies that neither the bidder nor the firm, corporation, partnership, or institution represented by the bidder, or anyone acting for such firm, corporation, or institution has violated the antitrust laws of this State, codified in Section 15.01, et. seq., Texas Business and Commerce Code, or the Federal antitrust laws, nor communicated directly or indirectly the bid made to any competitor or any other person engaged in such line of business.

MAIL ORDER TO:
(If different from address shown on

Uni-Copy Corp. of Texas
Person, Firm, or Corp.

EXHIBIT K

face of bid)

Uni-Copy Corp. Firm	5808 Parkersburg P.O. Box or Street No.
5808 Parkersburg P.O. Box or Street No.	Houston, Texas 77036 City, State, Zip Code
Houston, Texas 77031 City, State Zip	/s/ Louis Scantland Signed By Title: Vice President Date: 8-10-76

IMPORTANT: This proposal must be manually signed in ink. Entries of bid prices shall be made with ink or typewriter.

EXHIBIT K

SMALL ORDERS: Agencies will pay transportantion charges on all orders which have a NET total of less than $25.00.

Samples for testing may be required. Samples will be tested by one or more agencies selected by the Board of Control.

The State reserves the right to buy from another source if it is evident the contracted supplies will not serve the needs of any agency on a certain article or service. Tnis shall not be construed as a failure of the contractor to perform his contract nor as a breach of contract by the Board of Control.

THIS IS A "NET OR FIRM PRICE" TYPE OF BID.

NOTE: Complete the "Type or Number" column

EXHIBIT K

only if your number is different from that shown in the description.

FOR ZONES 5 ONLY

015-80-06

DISPERSANT AND TONER, SAVIN 750 COPIER

BRAND OR MPG Savin CASH DISC 0 % 0 DAYS

8 QTS IDSPERSANT and two Bottles 600 cc Toner with 2 Toner Valves

per case 36.00 case

EXHIBIT L

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK,	§	
Plaintiffs,	§	
vs.	§	
SAVIN BUSINESS MACHINES CORPORATION,	§	NO. CA3-78-0060-H
Defendant,	§	
vs.	§	
AMERICAN BUSINESS PRODUCTS, INC.,	§	
Third-Party Defendant.	§	

AFFIDAVIT OF LARRY STUTES

THE STATE OF FLORIDA §
§
COUNTY OF Hillsborough §

BEFORE ME, the undersigned authority, on this day personally appeared LARRY STUTES,

who, after being first duly sworn, stated under oath as follows:

1. "My name is Larry Stutes. I am over the age of eighteen (18) years, of sound mind and capable of making this Affidavit. The following statements are made from my own personal knowledge and are true and correct.

2. "I am presently a photocopier dealer in Largo, Florida. I was previously employed by the Savin Corporation as Regional Manager, Area Manager, then Director of Field Operations, Dealer Divisin. As an Area Manager, I supervised the Savin dealership organization in several states including the State of Texas, and assisted the Savin effort in connection with the State of Texas photocopier business after the initial contract was awarded in 1976.

3. "As the Area Manager with responsibilities in connection with the State of Texas photocopier business, I was aware of the structure of the business and the manner in which it was administered. The characteristics of the State of Texas photocopier business which was obtained by Savin and its dealers for Savin equipment and supplies in 1976 included the following:

A. "The Savin Corporation submitted the State of Texas copier bids only after due discussion and evaluation with the Austin Savin dealer. After 1976, such communications were principally with Uni-Copy and Mr. Jim Lawson.

B. "Although Savin submitted the

formal bid through Mr. Jim Lawson at the jointly agreed upon pricing, Savin did not have nearly as much contact with the contract as the local Savin dealer. The contract was managed and administered by the participating independent Savin dealers throughout the State of Texas. The independent Savin dealers were not allowed to compete with or bid against the coordinated efforts of Savin and Uni-Copy. The Savin Corporation had a policy, in fact, of not allowing such competition, and that practice was made evident to all of the various Savin dealers in the State of Texas. Dealers were expressly advised that

they were not to 'cause any waves', and were to cooperate with Uni-Copy in order to facilitate the 'administration' of the contract. The Savin officers and participants in the State of Texas business did not want price competition between Savin dealers and Savin Corporation in the State of Texas for the State's photocopiers business. This was communicated to me by both Mr. Rod Marcoux and Mr. Art Nendick. Both of those gentlemen were officers with the Savin Corporation at the time. This result was obtained through coercion and profit-sharing arrangements of Savin, Uni-Copy and the other participating Savin dealers.

EXHIBIT L

C. "I personally recall a Dallas Savin dealer being rebuked by Mr. Rod Marcoux because of the dealer's desire to compete for some of the State of Texas copier business. Mr. Art Nendick also participated in the chidding of dealers who dared to suggest that they might, individually, wish to competitively bid for some of the State of Texas copier business. In the specific instance to which I have made reference, the Dallas Savin dealership was not allowed to seek business from State agencies. The Branch was 'given the business' for which the Dallas dealership had requested the right to compete.

D. "Clearly, there was no competition among the independent Savin dealers or the Savin Corporation in connection with the State of Texas business, although those businesses could have competed for that business. In fact, several of the dealers which cooperated in the agreement not to compete on the State of Texas copier business were fierce day-to-day competitors in their dealer territories, such as Dallas. In other words, Savin dealers who were in competition with each other and the Branch in Dallas were not allowed to compete in connection with the State of Texas business. This particular copier

business included both copiers and supplies.

4. "Savin dealers were additionally forbidden from purchasing supplies from sources other than Savin. Both myself and Mr. Neil Henriksen policed the dealers during our inspections by viewing inventory in order to determine whether there had been any attempt to buy toner, dispersant or paper supplies from sources, other than Savin. We both made the dealers aware of the fact that the purchasing of supplies from other manufacturers could result in termination of the dealerships, respectively. This was also openly communicated to dealers at Savin Dealer Council meetings. I specifically recall statements that termination would result should a dealer buy his supplies from

another manufacturer at dealer meetings by Messrs. Charlap (the Chairman of the Board), Low (the President), Carlin (the Executive Vice President), Nendick (Vice President), and Marcoux (Vice President).

5. "Mr. Paul Charlap further told the Savin management during our internal meetings that he did not like the fact that Savin had independent dealers. He also stated that it was his private desire and intention to rid the Savin distribution network of as many dealers as possible in high population areas.

6. "The Savin Corporation was informed by me of numerous problems being unfairly inflicted upon the dealers in my area, which included the State of Texas. Those problems included the following:

EXHIBIT L

A. Unfair distribution in Dallas, Texas of Savin 700 Series plain paper bond copiers; most of the machines being allocated to corporate Branches; with very few being made available to the independent Savin dealers. This resulted in sales being made by the Branch, because the dealers did not have the inventory to deliver to customers. This unfair practice continued until Messrs. Marcoux and Nendick advised me that the attorney for Savin said that the practice was illegal. Thereafter, the independent Savin dealers began receiving much more of the allocation.

B. "Savin corporate sales representatives were also representing to

customers in the Dallas marketplace that the independent Savin dealers were in poor financial condition, that they were going out of business, that Savin warranties were not provided for a copier purchased from an independent dealer, and other untruthful and disparaging remarks. These remarks from corporate sales representatives were reported to my superiors in the Savin Corporation. The Savin Corporation took no action to correct that conduct, despite my many requests for some relief.

4. "Savin dealers were additionally forbidden from purchasing supplies from sources other than Savin. My regional manager, Mr. Neil Henriksen, pliced the dealers during

inspections by viewing inventory in order to determine whether ther had been any attempt to buy toner, dispersant or paper supplies from sources, other than Savin. The dealers were aware of the fact that the purchasing of supplies from other manufacturers could result in termination of the dealerships. This was openly communicated to dealers at Savin Dealer Council meetings. I specifically recall statements that termination would result should a dealer buy his supplies from another manufacturer at dealer meetings by Messrs. Charlap (the Chairman of the Board), and Low (the President).

5. "Mr. Paul Charlap further told the Savin Management during our internal meetings that he did not like the fact that Savin had independent dealers. He also

stated that it was his private desire and intention to rid the Savin distribution network of as many dealers as possible in high population areas.

6. "The Savin Corporation was informed by me of numerous problems being unfairly inflicted upon the dealers in my area, which included the State of Texas. Those problems included the following:

A. Unfair distribution in Dallas, Texas of Savin 700 Series plain paper bond copiers; more of the machines being allocated to corporate Branches, with very few being made available to the independent Savin dealers. This resulted in sales being made by the Branch, because the dealers did not have the

inventory to deliver to customers.

B. Pursuant to Mr. Marcoux' instructions, Savin Branches received new product three or four months before they were available to independent dealers in branch areas. This unfair practice continued until Messrs. Marcoux and Nendick advised me that the attorney for Savin said that the practice will illegal.

D. "Jayco Systems was greatly suffering because of the poor quality of the Savin 300 Series photocopiers. The inability of the Savin 300 Series copiers to generate a profit was not the fault of Jayco, because it was not a profitable machine for to dealers, generally.

The Savin Corporation refused to rectify the wrong which was being suffered by Jayco.

E. "I was also personally aware of the excess inventory of Savin 700 plain paper bond copiers for the Dallas Branch at a time when the independent Savin dealers in the Dallas area were unable to get machines. Despite my many complaints, and my personal pleas to Mr. Robert Low (the President), it was not until approximately 1978 that inventories began to be fairly allocated. The dealers did not stand a fair chance to compete with the Savin Branch, so long as they had no machine inventory for

demonstration or delivery to a customer. I was further personally aware that the reason that Savin's copier inventory was not being fairly distributed to the dealers in the Dallas area was so that the Savin Branch could receive the benefits of the revenues from those sales, at the expense of the dealer who should have been entitled to machines. It was a conscious decision, it was unfair, and it was not corrected until Savin's attorney characterized it as illegal several years later.

F. "I was also aware that the Savin Corporation obtained the customer lists of Jayco Systems, Inc., and

that the Savin Branch utilized it, improperly, in going after Jayco's customers. The Dallas Savin Branch operated under instructions to go after Jayco's customers by means including the use of Jayco's confidential customer lists.

G. "Finally, during the timeframe of 1975 through 1979, there was no effective competition for the Savin 700 Series plain paper bond copiers in the marketplace. It was the most reliable and dependable copier in the market in its price range, generally under $6,000.00. It, alone, caused Savin to become number one in the industry in the United States, outplacing both Xerox and

IBM combined, according to the Savin Chairman of the Board and its President. The Savin copier equipment 'controlled the marketplace' because of its unique capabilities. No other copier was comparable, and as a result, the only competition for the sale of Savin equipment was other distributors of the Savin equipment in a given territory, such as Dallas.

Further, affiant sayeth not.

Larry Stutes

SUBSCRIBED AND SWORN TO BEFORE ME on this the 6th day of February, 1984.

EXHIBIT L

Sheri D. Smith
NOTARY PUBLIC in and
for Hillsorough County,
Florida

My commission expires:
February 22, 1984

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been forwarded to counsel of record, pursuant to Rule 5, Federal Rules of Civil Procedure, on this the 6th day of February, 1984.

Samuel L. Boyd

EXHIBIT M

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK,	§	
Plaintiffs,	§	
vs.	§	
SAVIN BUSINESS MACHINES CORPORATION,	§	NO. CA3-78-0060-H
Defendant,	§	
vs.	§	
AMERICAN BUSINESS PRODUCTS, INC.,	§	
Third-Party Defendant.	§	

AFFIDAVIT IN CONNECTION WITH SAVIN MARKETING CONDUCT AND POLICIES

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

EXHIBIT M

BEFORE ME, appeared MARY L. WILSON, an individual residing in Austin, Texas, who previously managed the State of Texas copier business for the Savin Corporation, who is over eighteen (18) years of age and capable of giving an affidavit, who, after being first duly sworn, stated under oath as follows:

1. "My name is Mary L. Wilson. I am a resident of Austin, Texas.

2. "On January 1, 1980 I became employed by the Savin Corporation to manage the Savin copier business with the State of Texas. This involved management, supervision and bidding responsibilities in connection with both the annual contracts and open market purchase request. Although the annual rental bids were submitted directly from New

York, the open market purchase requests were bid from my office and usually under my signature.

"Prior to my selection as the manager for the State of Texas bond copier business for Savin, I worked for A. B. Dick and was similarly employed in connection with the bidding of office machine equipment on behalf of A. B. Dick to the State of Texas. I became familiar with the personnel, the issues, and the competitive conditions of bond copiers, as well as other office machines during this time. In the State of Texas copier markets, no real competition existed on copier contracts bid by Savin or Uni-Copy, since Savin Dealers and Savin cooperated on the bidding of Savin equipment.

3. "From and after my appointment as

the manager for the Savin State of Texas copier business, I was intimately involved in every aspect of supervising state agency customers who had either rented, leased or purchased Savin bond copiers and related equipment and supplies.

4. "Although I directly made no input for the annual rental contracts, I am aware that the pricing at which those contracts were bid was obtained through a cooperative effort between Savin Corporate representatives, Mr. Jim Lawson of Uni-Copy, the dealer representative, and state officials which included Mr. Trent Fowler. I personally participated in various formal meetings and informal "get togethers" with Savin Dealer representatives and Mr. Fowler present. At many of the informal meetings,

discussions regarding the prices at which bids should be submitted and strategies for maintaining the Savin machine population were discussed in detail. Pricing strategies relating to annual machine contracts, as well as open-market purchase requests were discussed and pricing agreements were made between Savin, its independent Dealers and State officials such as Mr. Fowler.

5. "Prices bid in connection with the State of Texas were not a reflection of a unilateral decision by Savin, but rather were a product of many conferences and meetings on the subject among Savin, its Dealers, Mr. Fowler and perhaps others. An example of the results of such a meeting is set forth in the Savin memorandum at Plaintiff's Ex. No. 4 from Ron Hoskings, a Savin Vice President.

It recognizes that prices for Savin copiers on open-market purchase requests were fixed by virtue of a meeting in Dallas, Texas. A copy of the memorandum setting forth the agreed bid prices was provided to Mr. Jim Lawson, a Vice President of an independent Savin Dealer.

6. On the basis of such meetings and upon express approval from Mr. Jim Lawson of Uni-Copy, I submitted bids for Savin on open-market purchases in connection with State of Texas copier business. Mr. Trent Fowler's continuing contribution was to monitor the bidders, the prices bid against the Savin equipment, as well as copier requisitions from the various State agencies, prior to the submission of such requests to vendors for bids. Mr. Fowler kept our office and Mr.

Lawson informed of these matters in order that Savin might increase and successfully protect its State of Texas copier population.

7. "Because of the influence of Uni-Copy and Mr. Trent Fowler, a State official of the State Auditor's office, I was not allowed to independently submit bids on behalf of Savin. I was bound by the Savin policy which required me to coordinate bids and pricing with both Mr. Lawson and Mr. Fowler. In the few instances in which I failed to coordinate bidding matters with either Mr. Lawson or Mr. Fowler, written complaints were submitted to my superiors.

8. "When Savin employed me in January, 1980, I recognized that the Savin Corporation had very little actual presence

in the State of Texas. Practicaly all of the marketing, customer relations, and maintenance of State of Texas copiers were handled by the various Savin dealers throughout the State of Texas. Those dealers managed the State of Texas copier business in territories mutually agreed between them and Savin. Savin, which relied on its influence over the independent Savin Dealers, had not developed its own alternative capability to market, install, service or successfully maintain a copier program in the State of Texas. One Savin Branch in Dallas was insufficient. Without the combination of the independent Savin Dealers, Savin had not developed the capability to comply with its obligations under the State of Texas contracts.

9. "Until my presence in Austin on behalf of Savin in January of 1980, virtually every aspect of Savin's State business, except for billing and receiving of monies, was coordinated for the Savin Combination by Mr. Jim Lawson of Uni-Copy in Austin. He handled the submission of virtually all bids and the marketing in large part for all of the cooperating Savin Dealers. He also coordinated the installation of copiers by selecting the installing Savin Dealer in the relevant territory in which a machine would be placed. Profits were split accoding to the agreement among Savin and the combination of Savin Dealers.

10. "One of my principal functions in assuming the management of Savin's State of Texas copier businss was to establish the

identity of the Savin Corporation as the vendor in the State of Texas contracts. Prior to my arrival, the State agencies considered the contracts to be those of Mr. Jim Lawson and Uni-Copy.

11. "I have reviewed the testimony of Mr. Neal Henriksen in this case. I have reviewed, specifically, his testimony regarding the policy of the Savin Corporation toward competition by independent Savin Dealers with the State of Texas set up among the dealers and Savin. Mr. Henriksen's description to the effect that dealers were "not to rock the boat" is correct. I am personally aware of situations in San Antonio and in El Paso in which an independent Savin Dealer attempted to bid in competition with the 'Savin Texas Combination.' Mr. Jim

Lawson of Uni-Copy requested both Dealers to withdraw their bids and share the profits of those transactions with Savin and Uni-Copy pursuant to the profit-splitting agreement then in effect among Savin and its Dealers. Both Dealers reluctantly withdrew their bids. This was in accord with the policy established by the 'Savin Texas Combination' for the State of Texas business.

12. "I am also aware that the State of Texas paid much more for Savin bond copiers through the bidding process than they would have had to pay if they had been ordinary retail customers. At a time when I was successfully bidding Savin copiers to the State of Texas for approximately $4,800.00, general retail customers and the public could purchase the same machine in Houston, for

instance, at approximately $2,200.00. There is no doubt in my mind that had competitive bidding been allowed to occur in the State of Texas business, Savin Copiers would have been purchased at lower prices. A look at the price competition in Dallas among Savin Dealers is an example of prices available to customers in areas where price competition existed.

13. "At any time had Savin lost the State of Texas annual rental contract for any particular contract category, no return of machines would have been expected nor likely. The loss of a rental contract should not suggest the return of rental machines. So long as State rentals or leased machines are satisfactorily performing, an agency usually continues to utilize the machine, unless a

better machine is available at a material cost savings. Thus, should Savin have lost the State of Texas annual rental contracts to another supplier in 1980, it would not have had to return 2,000 machines. In all likelihood, most, if not all, of the 2,000 machines would have continued to have been rented from Savin. Each annual contract contains renewal rental rates. These bids provide a basis upon which an agency can determine to continue to use a machine, although that particular brand or make of machine may no longer be the 'contract machine.' Only mechanical _____, over some reasonable time, would account for any loss of the Savin machine population.

14. "I know that Mr. Jim Lawson of Uni-Copy was able, through personal contact

with State of Texas officials, including Mr. Trent Fowler and Mr. Robert Schneider, to manipulate specifications to Savin's advantage on bid requests for copiers. Mr. Lawson has related instances in which specifications have been 'reworked over dinner in the evening' with Mr. Robert Schnieder.

15. "From 1977-1980, prior to my assumption of the management of Savin's State of Texas business and briefly thereafter, I observed virtually every office equipment bid award opening which would Mr. Fowler would attend with some representative of Uni-Copy and, at times, a representative of Savin. Mr. Fowler seldom, if ever, sat with any other vendor, and on the other hand, almost always sat with Savin or Uni-Copy representatives.

16. "Mr. Fowler not only worked for State of Texas, but he also worked very hard for Savin. Mr. Fowler was instrumental in obtaining a lobbyist for the Savin Corporation. He visited Savin in New York to advise Savin regarding the need for a lobbyist, and presented an overview presentation to Savin's attorney, Mr. Richard Craig in Austin, to explain the necessity for Savin's establishment of a formal lobbyist in Austin. Mr. Richard Craig, Savin's Attorney, was shocked that a representative of the State Auditor's office would present a position for Savin as Mr. Fowler had done. Moreover, Mr. Craig expressed his opinion that the parinoia exhibited by Mr. Fowler and Uni-Copy was not justified. He further advised that perhaps some of the irritation with the various State

Agencies was caused by Mr. Jim Lawson's unnecessary involvement in State affairs. Mr. Fowler also presented the same position at Savin Dealer meetings in which he encouraged the Savin Dealers to cooperate and work together to retain a lobbyist for their benefit, and to protect the system as it existed. Also present at that meeting were: Gabe Carlin, Executive Vice President of Savin; Ron Hoskings, National Marketing Director of Savin; Dennis Lawson, District Manager for the Savin Corporation; Mary Wilson, State Account Manager for Savin; Jim Lawson, Vice President and General Manager for Uni-Copy, and independent Savin Dealer.

17. "I am also personally aware of the scope and purpose of the Savin VIP trips which many State of Texas officials took. I

personally participated in some VIP trips. The principal purpose of such trips was to entertain and befriend State of Texas officials, generally in New York. There was no legitimate busines need for such trips. On the evening after one short trip to Durham, North Carolina, for example, State of Texas officials were flown by Savin's private jet to New York City for purposes of entertainment. The next morning, a limousine took the State of Texas party to Valhalla, New York for a short presentation on the history of the Savin Corporation. Thereafter, the State of Texas party was provided an elegant luncheon, including wine and other fine appointments, in the Boardroom of the Savin Corporation. After lunch, the State officials returned by limousine to New York City

for return to Texas. The overriding purpose of the trip was to flatter the Texas officials, to make them feel that they were important to Savin, and to strengthen Savin's ties to the State of Texas. There was no business purpose whatsoever for the trip. The information provided at either Durham, North Carolina or Valhalla, New York could easily have been presented in Austin, Texas. The real purpose of the trip was to provide the private jet trip to New York City, the Broadway show, dinner at Tavern On The Green in Central Park, the room at the Waldorf Astoria, the limousine transfer from New York City to Valhalla and back to New York City, and the final return jet flight. Had presentations occurred in Austin, there would have been no excuse for providing these

luxuries."

18. "From the introduction of the Savin 700 Series bond copiers in 1976, through at least 1981, Savin had virtual control over the contract categories for bond copiers on which it bid. The control has been absolute in the rental contract area, and has been virtually absolute in the open-market purchase portion of the State business. In literally hundreds and hundreds of open-market requests for bond copiers, I can safely state that Savin was able to control as much as 95% of the bids on which it competed. The number may be even higher. Savin was able to maintain control over the State of Texas business because of the peculiarity and procedures controlling that business, the cooperation and combination of Savin with its

willing or unwilling Savin Dealers in the State, a very dependable, reliable and relatively inexpensive plain paper bond copier, and the abnormally close relationships between Savin, Uni-Copy and various State of Texas officials, including Mr. Trent Fowler and Mr. Robert Schneider. Savin not only attempted, but achieved a monopoly in the various bond copier contract categories, as well as in open-market purchase transactions. That monopoly resulted from the availability of a superior copier in a price range 'all its own,' control over pricing and restraints on dealer competition, as well as through unshakable political relationships with Mr. Fowler and Mr. Schneider."

Further, Affiant Sayeth not.

By: Mary L. Wilson
Mary L. Wilson

EXHIBIT M

SUBSCRIBED AND SWORN TO BEFORE ME on this the 17th day of April 1983.

Susan L. Keeling
SUSAN L. KEELING, Notary Public
in and for the State of Texas

EXHIBIT N

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK Plaintiffs, V. SAVIN BUSINESS MACHINES CORPROATION, Defendant, V. AMERICAN BUSINESS PRODUCTS, INC., Third-Party Defendant	§ § § § § § § § § § § § § § § § §	CIVIL ACTION NO. 3-78-0060-H

DEPOSITION OF NEIL HENRIKSEN

TAKEN FOR PLAINTIFF

DATE REPORTED: September 1, 1982

REPORTER: JUDY G. WILLIAMS

feelings without identifying who it was or what means he would have or knowing it.

Q. (By Mr. Boyd) Did you communicate to the dealers Savin's policy on whether or not the dealers should bid against Uni-Copy on open market bids for photocopiers, did you?

MR. BRYANT: I object to the ambiguous question.

A. (By the witness) Yes.

Q. Okay. What did you tell the dealers, the Savin dealers here in the State of Texas in connection with that?

A. Well, it was Savin's policy at that particular time that nobody was to rock the boat.

Q. Did there ever occur any

situation in which any Savin dealer -- well, let me ask you this. Let me rephrase it.

What do you mean by rock the boat, no one was to rock the boat?

A. Well, we had a pretty sweet arrangement, Savin did at that time, set up for everybody as far as compensation for the dealers, and they were handsomely paid, and it was pretty much felt with the kind of money that they were getting, which was more than what they were due, that if they didn't cooperate...

that they would be canceled.

MR. BRYANT: I object to the nonresponsive answer.

Q. (By Mr. Boyd) Now, in connection with what you have just said about what you communicated to the dealers about not rocking the boat, did there ever occur a situation, for instance in El Paso, where somebody rocked the boat?

MR. BRYANT: I object to the vague and ambiguous question.

Q. (By Mr. Boyd) In connection with the State of Texas business.

A. I remember, I remember --

Q. The answer has to be yes or no.

A. Yes.

Q. What was the instance, sir?

A. Bill Jones wanted to bid on a machine and on T.D. packs.

Q. Who was he bidding against?

A. Uni-Copy.

Q. Did it relate to Savin equipment?

A. Yes.

Q. And T.D. packs?

A. Yes.

Q. What was your reaction when you found out...

Mr. Jones wanted to bid that?

A. I didn't care one way or the other, but my boss did.

Q. Who was your boss at that time?

MR. BRYANT: I object to the nonresponsive answer.

Q. Did anybody have a reaction at Savin when they found out that Mr. Jones was apparently going to put a bid against Uni-Copy?

A. Mr. Stutes did.

Q. What was his reaction?

A. He wanted to go in and set another dealer up.

Q. Did you participate in any response to Mr. Jones?

A. Yes.

Q. What was your participation?

A. I went out and solicited another dealer.

Q. When you say you went out, what do you mean?

A. I went out and interviewed another dealer, a 3M dealer in El Paso.

Q. Did you visit with Mr. Jones?

A. I didn't visit with Mr. Jones.

Q. What did you tell Mr. Jones?

A. I showed him the application for another...

dealer in El Paso, and asked him if he wanted to be the dealer.

Q. Did you convey any message to Mr. Jones in connection with his apparent interest in rocking the boat?

MR. BRYANT: I object to the leading question.

Q. (By Mr. Boyd) What did you tell him?

A. I told him we would prefer to have him as a dealer because he was the best in town, but if he wouldn't play ball, we would have to appoint somebody else, and that it was not my feelings, but that was the way it was going to have to be.

Q. Did Mr. Stutes direct you to convey any specific comment from him to Mr.

Jones if he didn't go along?

MR. BRYANT: I object to the leading question.

A. (By the witness) Nothing really other than he would be canceled.

Q. Did he, did Mr. Stutes indicate to you that you should convey to Mr. Jones any specific slang if he did not go along?

A. He indicated that we would probably cut his nuts off.

EXHIBIT O

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK Plaintiffs, V. SAVIN BUSINESS MACHINES CORPROATION, Defendant, V. AMERICAN BUSINESS PRODUCTS, INC., Third-Party Defendant	§ § § § § § § § § § § § § § § § §	CIVIL ACTION NO. 3-78-0060-H

AFFIDAVIT OF PAT LOCONTO
IN SUPPORT OF SUMMARY JUDGMENT

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared PAT

LOCONTO who, after being first duly sworn, stated under oath as follows:

1. "My name is Pat Loconto, and I am a National Partner within the Management Consulting Division of Touche, Ross & Co. I office in Dallas, Texas.

2. "Touche, Ross & Co. has been retained by the Plaintiffs in this case to offer expert testimony in connection with the calculation of damages resulting from the various claims of the Plaintiffs.

3. "I have been deposed four times by counsel for the Savin Corporation. As a result of extensive examination, I recognized that one assumption I had made underestimated costs incurred by the Plaintiffs in my calculation of the State of Texas lost profits. Appropriate corrections have been made with

the corrected projection now set forth at Plaintiffs' Ex. No. 3 of Plaintiffs' Exhibits in support of their Motion for Summary Judgment.

4. "The numbers reflected in the estimates of both past and future lost profits are very conservatively set forth. The estimated damages are conservative for several reasons:

a. Costs as a percentage of revenues was overstated, as it included cost ratios for Jayco which included the higher costs of the Savin 300 plain paper bond copier which none of the other Dallas entities nor the Corporation had to service. Thus, costs were overstated, and net income, correlatively, understated.

b. Revenues generated by Copy &

Litho of Fort Worth, Texas were not included in revenue projections in "Lost Jayco Profits Per Territorial Dealer Revenues", and thus such projections conservatively understate the net income Jayco would have earned in the Territory.

c. From and after 1979, revenues in the territory are kept constant. Such revenues were extended on a straight-line basis, despite the fact that Savin representatives have indicated that at the time Savin was number one in the placement of bond copiers, outplacing both Xerox and IBM combined. Thus, a straight-line extension of revenues from and after 1979 is an understatement for purposes of conservatism.

The numbers reflected in the projections are conservatively set forth for the

above and other reasons. The numbers upon which the projections are based originated from documents provided by the indicated Savin Dealers, Savin Branch, Savin Corporation, and the State of Texas.

5. "The Adjustment Factor applied to 1975-1982 dollars is the GNP Implicit Price Deflator provided by the U.S. Department of Commerce, Bureau of Economic Analysis. This Factor is generally utilized to bring historical dollars to present values. The Adjustment Factor applied to 1983-1986 dollars is the Intermediate Taxable Government Bond Yields which was obtained from the Standard & Poors publication, "Credit Week". This factor is utilized to discount future dollars to present values. Both sets of factors are utilized not only in

government and industry, but have been utilized previously in estimating damages in litigation. All amounts reflected herein have been so adjusted.

6. "Plaintiffs have alleged violations by the Savin Corporation in connection with its purchase of the Savin copier business in the Dallas area. The damages incurred by Jayco according to Plaintiffs' allegations would consist of monies spent on the Savin 300 Series plain paper bond copiers and the non-compete agreement which Plaintiffs allege was violated by the Savin Corporation. Those damages identified in accordance with actual payments by Jayco and adjusted by the Implicit Price Deflator would constitute the sum of not less than $500,146.00. Per Plaintiffs' counsel's

instructions, that figure is included as part of Jayco's claims for damages under Fraud, RICO and Breach of Contract.

7. "Plaintiff Jim Woznick has also claimed damages in the form of lost salary by virtue of Savin's violations of Fraud, RICO and Breach of Contract. Those figures, previously set forth in deposition, constitute a sum of not less than $594,092.00.

8. "Jayco has also claimed damages arising from losses directly related to the Territory and the State of Texas copier business. Under the theories of Fraud, RICO and Breach of Contract, Jayco's damages may be broken down as follows:

a. Lost profits from the sales of additional dealers appointed in the Territory in the amount of not less than $404,439.00

during the period of 1976-1977.

b. Lost profits from the Savin Branch related sales in the Territory during the period of 1976-1986 constitutes a sum of not less than $4,393,715.00.

c. Lost profits from the State of Texas bond copier business. These damages from 1976-1986 total not less than $9,510,824.00.

d. Jayco has also claimed for damages due to acts of Unfair Competition at the instance of the Savin Corporation. Such damages include those same damages set forth above in connection with lost Territorial profits and the State of Texas lost profits.

9. "Plaintiffs have claimed damages due to violations of the Antitrust laws by the Savin Corporation and others in com-

bination with it. Those antitrust damages can be categorized into two dinstinctive markets:

a. Territorial lost profits determined from the sales of the additional appointed Savin Dealers and the Savin Branch during the period 1976-1986 of not less than $6,762,224.00.

b. Damages to Jayco in connection with the State of Texas bond copier business from 1976-1986 of not less than $9,510,824.00.

The total damages incurred as a result of the claimed Antitrust violations by the Savin Corporation is the sum of not less than $16,273,048.00. The figures forming the basis for these projections have in large part been obtained directly from the State of

Texas, the Savin Corporation, and the Savin Branch, with some additional documentation obtained directly from local Savin Dealers.

10. "Plaintiffs have also claimed for an award by the Court for the unjust enrichment obtained by the Savin Corporation combination and conspiracy. Since the lost profits of Jayco and these projections have been understated by virtue of overstating the expense ratio, Savin has been unjustly enriched not less than the sum of (1) lost profits earned in the State of Texas business in an amount of not less than $9,510,824.000, (2) profits wrongfully obtained after the reinstatement of the Savin Branch bond copier operations in 1976-1986 in an amount of not less than $4,393,715.00 and (3) monies received by Savin for the Savin 300 machines

and money paid by Jayco for the non-competition covenant in an amount of not less than $500,146.00, for a cumulative sum for unjust enrichment in the amount of not less than $14,404,685.00.

11. "I have been qualified and have testified as an expert in similar Antitrust and business-related cases before. I have utilized those professional and business methodologies which have been utilized in both business and in formal court procedures.

12. "The Savin Corporation has presented no documentation which would suggest that any of the figures utilized in these projections over-estimates any loss or includes any factor not justified on the records of this case."

Further, affiant sayeth not.

EXHIBIT O

By /s/ P.A. Loconto
PAT LOCONTO
National Partner

SUBSCRIBED AND SWORN TO BEFORE ME on this the 15th day of April, 1983.

/s/ Susan L. Keeling
NOTARY PUBLIC in and for
the State of Texas

APPENDIX III

85-1856

Supreme Court, U.S.
FILED
APR 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAYCO SYSTEMS, INC.,

Petitioners,

v.

SAVIN BUSINESS MACHINES CORPORATION

Respondent.

APPENDIX III TO THE PETITION FOR WRIT OF CERTIORARI EXHIBITS P — Y

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EXHIBIT P

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC.,	§	
JIM WOZNICK and	§	
SHIRLEY WOZNICK	§	
	§	
V.	§	CIVIL ACTION
	§	NO. 3-78-0060-H
SAVIN BUSINESS	§	
MACHINES CORPROATION	§	

DEPOSITION of SAVIN BUSINESS MACHINES CORPORATION, by MAX SCHULTES, pursuant to Agreement, taken by Counsel for Plaintiffs, held at Savin Busines Machines Corporation, Columbus Avenue, Valhalla, New York on Wednesday, January 30, 1980 at Ten o'clock a.m.

DEPOSITION OF MAX SCHULTES

EXHIBIT P

MR. BOYD: Yes, has he personally.

Q. Do you keep up with the competitive machines in your price range and in your purpose range?

A. Well, when we came out with the 700, the first year or two we had no competitors, you know.

Q. Who, today, after that first couple of years? Is there anybody who is a strong competitor as far as placing machines in this same price range for these purposes?

A. Well, you have Cannon is one. Saxon is one. Today you have Sharp. You have Royal in a certain class. You have Minolta. Practically everything out of Japan is now catching up with Savin.

Q. When you say "catching up with

Savin," you mean they are starting to market liquid toner machines in this price range?

A. Not liquid toner; powder toner. The only three liquid toner machines today are Savin, Saxon and Cannon. The rest is all powder.

Q. Do you have any indication that the Cannon machines are outplacing the Savin machines today?

A. I don't think so.

Q. What about the Saxon machines in this price range and for office purposes, are they outplacing Savin...

EXHIBIT P

machines?

A. What do you mean by "outplacing?"

Q. Number of units.

A. No, we are the leader in placing units.

Q. How long have you been the leader in placing units, do you know?

A. I think '78 and '79.

Q. I have read some Savin advertisements and I may not be using the exact words, but are you aware of advertisements of Savin that have said that you are now outplacing Xerox and IBM combined?

A. Yes, that's right, with numbers of machines, which is a different -- if you go by quantity of copies, it's a different

ballgame.

Q. But the number of machines?

A. The number of machines we have placed.

Q. The two combined?

A. Yes, that's the advertisement.

Q. Is it true?

A. It's true. Data Quest came out with that.

Q. I might say, with no tongue in cheek at all, that's quite an accomplishment.

A. Thank you.

Q. When were you first aware that you were...

outplacing Xerox or IBM, do you recall?

A. No. That's Marketing.

Q. Marketing?

A. I look at these things and --

Q. Sure.

For the quality of the product and the price, the price range here in the 700 Series machines, is there another machine of those you mentioned, Cannon, Sharp, Royal or Minolta, that gives you as good a quality product and is as dependable and reliable as the Savin machines?

A. I don't know the reliability because we don't have information on that.

Q. Marketing, again?

A. I don't know. Marketing. I don't have any information on that either. A

company like Data Quest would be able to supply you with that kind of information, but they do the market study for the whole industry.

Q. Does the fact that you are outplacing IBM and Xerox combined give you some idea of the competitiveness of your product?

A. How you --

Q. Does that give you some indication of how strong a consumer product it is?

A. Yes.

Q. Do you have any reason to believe that either Cannon, Saxon, Sharp, Royal or Minolta, do you have any reason to believe that they're going to be outplacing IBM and Xerox combined in the near future?

A. I don't think so.

Q. Earlier, Mr. Schultes, we talked generally about the dependability and reliability of the 300's and I recall some testimony regarding the fact that if the proper service is given the machine that the machine will run and be dependable and reliable?

A. (Shaking head yes.)

Q. If the proper service requirements are excessive, the requirements in manhours to keep them running --

A. Yes?

Q. -- is that a problem as far as profitability to this corporation?

A. Can you phrase it a little bit different?

Q. Yes.

Even if the machine can be kept running, the 300 Series machine, can be kept running with proper servicing, if proper servicing requires an inordinate amount of time, can that not have a serious effect on the profitability of those machines on rental?

EXHIBIT Q

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK,	§	
Plaintiffs,	§	
vs.	§	
SAVIN BUSINESS MACHINES CORPORATION,	§	NO. CA3-78-0060-H
Defendant,	§	
vs.	§	
AMERICAN BUSINESS PRODUCTS, INC.,	§	
Third-Party Defendant.	§	

AFFIDAVIT OF COLLENE COLLINS

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared COLLENE

COLLINS who, after being first duly sworn, stated under oath as follows:

1. "My name is Collene Collins. I am over the age of eighteen (18) years, of sound mind, and competent to make this affidavit in all respects. I affirm that the statements contained herein are within my own personal knowledge, and are true and correct.

2. "I received my undergraduate degree from Kansas University, and my Master's in Business Administration from Columbia University in New York City, New York. I am presently employed as an Independent Contractor, associated with Henry S. Miller, Commercial/Retail Division of Dallas, Texas.

3. "Subsequent to receiving my

M.B.A., I did work with Citicorp in New York City. There I performed various banking functions, and later moved to Dallas, Texas where I became employed by Mercantile National Bank at Dallas.

4. "During my tenure with Mercantile National Bank at Dallas, I served in various capacities. My responsibilities generally concerned the lending of money for various business pursuits. In that regard, I was in charge of the Private & Professional Banking Departments. I further was the Chairman of the Private Banking Loan Committee. I also served as an Alternate Member for the Executive Loan Committee of Mercantile National Bank. In all of these positions, I was constantly evaluating and rendering decisions on requests for business and other

types of loans. My individual discretionary lending authority was $1,000,000 for an unsecured loan and $2,000,000 for a secured loan. That is, I was authorized to lend those amounts of money "on the spot," without referring the loan request to any committee for approval prior to funding. Upon my departure from Mercantile National Bank at Dallas in the Summer of 1983, I was a Senior Vice-President.

5. "I have been requested to evaluate the creditworthiness of Jayco Systems, Inc., and Mr. and Mrs. Woznick in 1976 with respect to whether or not the Woznicks and Jayco Systems, Inc., possessed sufficient creditworthiness for a line of credit sufficient to allow them to successfully manage the State of Texas bond copier business, both rentals

and sales, machines and supplies, from 1976 to date.

6. "In arriving at my evaluation, I have conferred with Mr. James Woznick and Mr. Robert White, presently the President of InterFirst Galleria and formerly the lending officer for Jayco Systems, Inc., at the First National Bank of Dallas. I have been provided financial summaries, prepared by Touche, Ross & Co., reflecting profits from the State of Texas copier business. I understand that the data reflecting the revenues and placements was obtained directly from records generated by the Savin Corporation, the supplier, and maintained by the State of Texas. I also understand that the costs assessed against those revenues were determined by Touche, Ross & Co., which

utilized the actual cost ratios incurred by Jayco Systems, Inc., in its day-to-day business. I have additionally reviewed various other financial statements which I deemed material.

7. "I have determined from my personal investigation and my evaluation of various financial documents that the creditworthiness of Jayco Systems, Inc. and Mr. and Mrs. Jim Woznick in 1976 was excellent. The Woznicks and their business made regular and timely payments of their obligations to the First National Bank and managed their credit exposure in an excellent manner. Both the Woznicks and their business, Jayco Systems, Inc., in 1976, would have been considered excellent banking prospects, particularly in regard to the State of Texas copier

business.

8. "My opinion, based upon my banking experience and my factual investigations, is that any competent banker would prob-ably have granted Jayco Systems, Inc., the financing it needed to initiate the State of Texas copier business in 1976. In my position at Mercantile Bank I would have approved such financing.

9. "Further, once the first year of the contract had been completed and Jayco's banker could see that the contract generated the revenues which it actually generated, the line of credit could easily have been extended, in order to finance the State's increasing demand for Savin products. The State of Texas copier business was obviously an extremely lucrative contract, and the pro-

fits generated by that contract would have easily allowed Jayco Systems, Inc., to repay its obligations in a timely and satisfactory manner. Although the assumptions of Touche, Ross & Co., did not require that Jayco Systems, Inc., reinvest its profits in the acquisition of product for the contract, Mr. Woznick indicated that Jayco would, indeed, have applied its profits to the reduction of the line of credit debt, making the loan even more secure and desirable from the standpoint of the Bank. Furthermore, Mr. Woznick indicated that all payments from the State of Texas would be assigned to the bank and applied first to the debt and then to Jayco.

10. "As a Senior Lending Officer at the Mercantile National Bank at Dallas, under these assumptions and circum-stances I would

have enjoyed the opportunity to have extended the necessary credit to Jayco Systems, Inc., and to have played some part in what would have been a very successful undertaking.

11. "Further affiant sayeth not."

Collene Collins
COLLENE COLLINS

SUBSCRIBED AND SWORN TO BEFORE ME on this the 12 day of February, 1984.

Susan L. Keeling
NOTARY PUBLIC, State of Texas

My commission expires:
September 19, 1985

EXHIBIT R

July 8, 1976

Mr. Art Nendick, Vice President
Savin Business Machines Corporation
Columbus Avenue
Valhalla, New York 10595

Dear Art:

Since our total dedication to SAVIN began April 30, 1986, Shirley and I have instilled renewed efforts and enthusiasm to make Jayco Systems, Inc., a better and exclusive Savin Dealer. We have had many adversitites to overcome, including the obtaining of sufficient Savin 750s, but still believe in the ultimate potential of this dealership - that is until a recent action by Savin branch operations here in Dallas.

I received a phone call July 1st from Steve Sachs, who was in Dallas to hire a replacement for Bob White, former branch manager.

Steve informed me that Mary Ann Hardin, sales person for the Dallas branch, had an opportunity to replace one of Jayco's 300 bond rental accounts with a Savin 750 copier. According to Steve, he has told Mary Ann and all other sales personnel (our former empoyee, Dave Riley, included) that Jayco accounts should not be solicited by Savin branch representation. Steve suggested that we call on the account and handle the prospective 750 copier sale.

The account, Malcolm Dade, had already sent Jayco a letter of cancellation on the 300 bond rental dated June 25, 1976, and received by Jayco on June 26, 1976. The normal action for Jayco is that we contact the account to determine the reason for the cancellation and see if we might save the account. The rental

base on the account is $62.00 per month plus meter, and the average billing to this customer for the past three months has been $151.38.

I visited the Malcolm Dade office Friday, July 2. On entering the office, you enter a reception area where the receptionist is seated behind a glass enclosure. Immediately thru the enclosure and behind the receptionist at the desk stands the Savin 300 bond copier - very evident even to an untrained eye. I was referred to the office manager, Mrs. Bonnie Riggs. My reception was very cool after I presented my card. She informed me that Jim Holton and Mary Ann Hardin had made a cost comparison for her based on recent JAYCO RENTAL INVOICES. Their comparison showed Mrs. Riggs a much more econo-

mical program with a 750 rental program! Apparently not at [illegible] the published rental programs presented in Savin's [illegible].

I questioned the word "rental" as opposed to a lease or lease-purchase plan as I was sure tnat she could not rent a 750 for less than $151.38 per month. Mrs. Riggs was adamant that it was a rental program offer and she was not interested in a lease or lease purchase plan. She also wanted to know when we were going to remove the 300 copier as she was told by Jim Holton and Mary Ann Hardin that due to certain technicalities between Jayco and Savin they could not place the 750 copier untl she got rid of the 300 from Jayco. This makes one wonder about the integrity Savin has with regard to a

$50,000.00 non-compete agreement with this dealer.

Actually, the damage had already been done prior to Steve Sachs' call on July 1. The 300 copier had been cancelled, and the only way Mrs. Riggs will consider Jayco placing the 750 in their office is if we offer a "better deal" than the Savin branch.

Art, as you are well aware, we are not in a position to rent 750 copiers - even if we were able to obtain ample machines - especially on a rental program for less than the 300 bond! We are striving to continue monthly note payments on our 300 copiers, as well as on our so-called non compete note with Savin. Our commitment to Savin becomes more insurmountable when we consider com-

petition from the branch itself, as well as the new dealers who need only to operate their business with the new 750 copiers and not fight the perils of the Savin 300 program.

Based on our total commitment to Savin Business Machine, and our non compete note payments, it is imperative that immediate action be taken to rectify these infringements upon our agreement. Your immediate reply will be appreciated as this matter and its resolution have a direct bearing on Jayco's future business possibilities.

Thanking you in advance for your cooperation and expedient handling of this matter, I remain,

Respectfully,
JAYCO SYSTEMS, INC.

EXHIBIT R

/s/ Jim

Jim V. Woznick, President

sbw

bcc: Neil Henriksen

EXHIBIT S

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK	§	Docket No. CA3-78-0060-H (CA3-78-1393-D transferred and consolidated with and into CA3-78-0060-H)
Plaintiffs,	§	
V.	§	
SAVIN BUSINESS MACHINES CORPROATION,	§	Dallas, Texas February 24, 1984 8:30 O'clock A.M.
Defendant,	§	
V.	§	
AMERICAN BUSINESS PRODUCTS, INC.,	§	
Third-Party Defendant	§	

VOLUME I
ORAL ARGUMENT ON SUMMARY JUDGMENT
BEFORE THE HONORABLE BAREFOOT SANDERS

TRANSCRIPT ORDERED BY: SAMUEL L. BOYD
(Boyd & DuBose)

APPEARANCES:

For the Plaintiffs: Boyd & DuBose
BY: SAMUEL L. BOYD

ORAL ARGUMENT ON SUMMARY JUDGMENT

EXHIBIT S

TIMOTHY M. FULTS
3500 InterFirst One
Dallas, Texas 75202

For the Defendants:

Carrington, Coleman,
Sloman, Johnson &
Blumenthal
BY: CORBET F. BRYANT
TYLER A. BAKER
LYMAN G. HUGHES
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

ORAL ARGUMENT ON SUMMARY JUDGMENT

calculations but it isn't necessary for us to come in, and I think all we are doing is creating fact issues as to how you mechanically calculate things, whether he has correctly chosen the right service calls or whether he has correctly made one calculation or another whether they would have made money. If that is all we are down to then there would be a fact issue there if we brought in the affidavit. But he bases his calculations on a number of assumptions and they are just all wrong. He assumes that causes of actions are established. His affidavit does not establish a cause of action.

With regard to the Colleen Collins affidavit, Mr. Bishop was not a retained expert for us. The reason Mr. Bishop was deposed was that Mr. LaConta indicated that

he was sure that there was capitalization there because he was told that somebody at Republic could do it. So we deposed Republic. They state that there was an application for a loan, $86,000.00 was turned down and Mr. Bishop was asked by me "If you had been asked to finance the State of Texas thing which you see here would have been favorably received?"

"The answer is "No."

Now, Colleen Collins in her affidavit which has just been recently filed. What does she say? She doesn't say that anyone approached her when she was at the Mercantile for any kind of loan to Jayco. That doesn't happen. What is she doing? She is looking back -- well, she is doing several things. She has...

EXHIBIT T

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK Plaintiffs, V. SAVIN BUSINESS MACHINES CORPROATION, Defendant, V. AMERICAN BUSINESS PRODUCTS, INC., Third-Party Defendant	§	CIVIL ACTION NO. 3-78-0060-H

ORAL DEPOSITION OF

JACK BISHOP

ANSWERS AND DEPOSITION OF JACK BISHOP, produced as a witness at the instance

ORAL DEPOSITION OF JACK BISHOP

EXHIBIT T

of the Defendant taken in the above styled and numbered cause at 10:00 a.m. on the 20th day of December, 1982 before David Cogburn, a Certified Shorthand Reporter in and for the State of Texas, County of Dallas, at the offices of CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, 2500 Plaza of the Americas, South Tower in accordance with the Notice and the agreement hereinafter set forth.

ORAL DEPOSITION OF JACK BISHOP

A. Not to my knowledge.

Q. Based on your experience as a loan officer -- strike that.

MR. BRYANT: I'll pass the witness.

CROSS EXAMINATION

BY MR. BOYD:

Q. Mr. Bishop, do you remember that question that dealt with four hundred thousand dollars investment a moment ago to which I made an objection?

A. Yes, sir.

Q. It's a fact you don't know anything about any State of Texas contracts nor the elements of that contract, isn't it?

A. That's correct.

Q. So you don't know whether or not

there was any exposure of the bank in connection with such contracts; is that correct?

A. That's correct.

Q. You don't know whether there was any exposure to Jayco, some contracts had been obtained, do you?

A. No, sir.

Q. And whether or not a bank loan was ever given to function from, and as to whether or not the...

bank that makes a loan, exposure or risk is always an important element in whether or not to make a loan, correct?

A. That is correct.

Q. And in connection with any of the State of Texas billings, you were not aware of any risk that might have existed, is that correct?

A. I was not aware of the State of Texas business that you refer to.

Q. All right. Do you have - I have not seen here in the evidence - do you have any loan application ever submitted to you by Jayco Systems? Not Mr. Andreff, but Jayco Systems itself?

A. Mr. Andreff represented Jayco Systems to me.

Q. Do you have any written application for a loan from an officer of Jayco Systems?

A. As I recall, one of the letters from Mr. Andreff outlined the loan request.

Q. Okay. Did this bank in 1976 have formats, that is, a printed format that people would fill out or buisness would fill out when it wanted a loan?

A. Not that any buisnesses would fill out, no.

Q. And you did not at that time have a practice of asking for specific documents from a business that might might want a loan, such as resolution authorizing a loan and other such submissions?

A. If we had gotten to the point where we approved the credit facility, then we would have asked for the corporate resoltuions if the company requesting the credit was a corporation. We have other documents we use covering proprietorships and partnerships.

Q. What kind of credit check did you run on Mr. Woznick personally?

A. None.

Q. If Mr. Woznick was going to be responsible for the loan and Jayco obtained

the loan, would his creditworthiness be an element at that time to consider?

A. I was told by Mr. Andreff that Mr. Woznick's guaranty of any credit request was not to be considered.

Q. Had Jayco been requesting a loan upon which you would have been able to rely upon a guaranty from Mr. Andreff and Mrs. Woznick, would their financial statements and their financial...

situation have been important to you in making or not making the loan?

MR. BRYANT: Object to the question as being vague and ambiguous.

Q. Would you have utilized the creditworthiness of Mr. Andreff and Mrs. Woznick in connection with any loan made to Jayco had they been willing to make the guarantee or --

A. If they were gonig to be liable, yes.

Q. And you did not consider their personal creditowrthiness, is that correct?

A. That is correct. In connection with the loan that Mr. Andreff requested, that is right.

Q. And Mr. Andreff was basically

seeking to buy out the Woznicks, was he not?

A. That is correct.

Q. It is a fact from reviewing your loan file here that you never turned down any formal request to you by Jayco itself in connection with its normal course of doing business as to loans for machines or other related other business expenses. You have never turned down one of those, have you?

MR. BRYANT: Object to the question as again being vague and ambiguous. When it says normal course of buisness, there's no...

loan the Woznicks would be personally liable?

A. No.

Q. Is the quality of the machine -- you do inventory financing. Let me restate this. You do inventory financing here at RepublicBank for various businesses, do you not?

A. Yes.

Q. Or some variation of it?

A. Yes.

Q. Is the quality and competitiveness of the machine an important factor to be considered in such loans?

A. It is a factor to be considered.

Q. If a machine, in fact, is the top machine in a particular product line, would that be an important factor to con-

sider?

A. Yes.

Q. Would it be an important factor to consider if the rquested line of credit dealt with somebody like the State of Texas as a guarantor for the purchaser's side of the machine or the renter's side?

MR. BRYANT: Object to the question as mischaracterizing, the evidence not being based on a proper predicate, and vague and...

ambiguous in the use of the word guarantor.

Q. In looking at a rental line of credit or inventory financing, is the creditworthiness of the renter a factor which you would consider?

A. Yes.

Q. Would the State of Texas generally be considered a good renter by the bank as far as being creditworthy?

A. Yes.

Q. Have you ever had any experience in the past where any of your customers have had significant financial problems because the State of Texas merely was unable to pay?

A. No.

Q. Do you find that the obligations

of the State of Texas are generally good facts upon which you could base a decision in making a decision to enter a rental program?

MR. STOCKWELL: Read that back. I think you misstated that.

Q. Let me restate it. Do you have any reason to believe that in a rental or inventory financing situation with the State of Texas, is there any fact that you are aware of that would indicate to you that the State of Texas would not be...

Q. Let me ask you in connection with Exhibit Number 6, were you relying on the individual creditworthiness of any other person besides Mr. Andreff in rendering the opinion which you have?

A. Not any other person.

Q. Okay. Are you aware at what time Mr. Andreff formally split off from Jayco Systems and formed his own company?

A. No.

Q. This is dated April 16th, 1976. Is it your statement under oath today, sir, that Mr. Andreff was still representing to you at that time, April 16th, or is this a follow-up memorandum?

A. On April 16th, my memorandum that I dictated states that he had started

his own company. And I would make the assumption, of course, that he had left Jayco around that date.

Q. Okay, sir. How much cash -- did you make an opinion at the time how much cash Mr. Andreff would have needed in order to -- just for his own personal purposes to buy out Jayco and continue the business to the satisfaction that you would have granted him a credit line? Did you ever make that decision.

A. No.

Q. If he had fifteen or twenty thousand dollars would that have made a difference?

A. I don't recall.

Q. Would you be speculating at this time to try to say how much cash would have been required or what strength a financial backer would have been required? Would it be total speculation at this point?

MR. BRYANT: Object to the question as being leading, also vague and ambiguous.

A. I wouldn't want to speculate at this point how much cash would have been needed at that point in time.

Q. Okay. Do you have here at the

bank any kind of --

A. That hasn't been entered into evidence.

Q. Do you have anything here at the bank that would relate to procedures you utilize, if there were any, in connection with making inventory financing lines of credit, or is it just your rule of thumb?

A. The credit decisions are left up to the judgment of the officer handling the request. It's very unusual for us to make a loan based on...

in documents you have produced today absent a sufficient guarantor that you would not make the loan to Mr. Andreff or statements to that effect. Is the corollary to that that with a sufficient guarantor, you would have considered the loan?

A. With someone I considered creditworthy, yeah.

Q. All right. In a closely held corporation such as Jayco Systems, had Jayco itself been seeking a loan to finance inventory or whatever, would it have been your normal procedures in 1976 to have corresponded at some time with the president of this closely held company?

A. Yes.

Q. And if the closely held company

wanted to finance a floor plan for rentals or anything else, would that have been a normal part of your procedures to contact the president of that closely held corporation?

A. Or his designated representative.

Q. But you would have at some time contacted him; is that correct?

A. Normally we do. Much of the negotiations are often handled by the financial officer of the company.

EXHIBIT U

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK Plaintiffs, V. SAVIN BUSINESS MACHINES CORPROATION, Defendant, V. AMERICAN BUSINESS PRODUCTS, INC., Third-Party Defendant	§	CIVIL ACTION NO. 3-78-0060-H

AFFIDAVIT OF JERRY ANDREFF

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared JERRY

ANDREFF, who, after being first duly sworn, stated under oath as follows:

1. "My name is Jerry Andreff. I am over the age of eighteen (18) years, of sound mind, and competent to make this affidavit in all respects, that the statements contained herein are within my own personal knowledge, and are true and correct.

2. "I worked with Jayco Systems, Inc. from late 1974 through the Spring of 1976. Improper suggestions have been made by Savin in connection with the reason that I left my association with Jayco Systems, Inc.

3. "First, I left Jayco because of Savin's refusal to own up to its support responsibilities for the Savin 300 Series plain paper bond copiers, because it was not fairly allocating sufficient machines to

allow Jayco to generate sufficient revenues for the expansion I desired, and because Savin refused to allow an allocation for Jayco to undertake large institutional accounts, such as the State of Texas.

4. "Had Savin agreed to allocate machines to Jayco in the event Jayco obtained customers such as the State of Texas, I would have stayed with Jayco. In fact, had Jayco even been allowed to bid on the State of Texas business, I would have returned to Jayco in order to assist in the administration and service of the State of Texas copier business.

5. "I had many years of experience dealing with State governments, and particularly with the State of Texas. I serviced the State of Texas copier business for

Saxon Business Products where I first worked under Mr. Art Nendick, later an officer with the Savin Corporation. I knew, by experience, that the State of Texas copier business was a profitable one if a reliable and dependable machine could be bid. I actively and vigorously pursued business with the State of Texas while I was at Jayco, and continued to make evident my interest at my new business, Copy Systems.

6. "In fact, after leaving Jayco in the Spring of 1976, I did submit a bid for the State of Texas copier rental contract for the North Texas zone. In fact, I was the low bid for the particular category, but the State of Texas representatives refused to either award the contract to me, or to discuss with me the reason for their failure

to award the contract to me. Savin, while not low bidder, got the award. I am saying that, in fact, my bid was the low bid on the State's 'cost per copy' formula. Yet, I was never awarded the contract, and the State representatives, such as Mr. Schneider and Mr. Fowler, refused to give me a reason for their decision not to award me the State's business for the contract which I sought for the North Texas zone.

7. "Subsequent to leaving Jayco Systems, Inc. in the Spring of 1976, I became aware that the Savin Corporation did in fact bid for the State of Texas copier rental contracts for which Jayco had desired to bid. When I became employed by the Savin Corporation in Dallas at the Dallas Savin Branch, I became aware of the fact that com-

petition in connection with the State of Texas business was not allowed, that an agreement had been reached between Savin and various Savin dealers which precluded any price competition for the State business.

8. "While at the Dallas Savin Branch, I also became aware that Savin and Uni-Copy in Austin controlled the bidding for Savin products to the State, including pricing, the identification of the installing dealer or branch, and the commission split for those dealers who participated in the Savin arrangement."

Further, affiant sayeth not.

/s/ Jerry Andreff
JERRY ANDREFF

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of February, 1984.

EXHIBIT U

/s/ Susan L. Keeling
SUSAN L. KEELING, Notary Public
in and for the State of Texas

My commission expires September 19, 1985

EXHIBIT V

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK	§	
Plaintiffs,	§	
V.	§	CIVIL ACTION NO. 3-78-0060-H
SAVIN BUSINESS MACHINES CORPROATION,	§	
Defendant,	§	
V.	§	
AMERICAN BUSINESS PRODUCTS, INC.,	§	
Third-Party Defendant	§	

- - -

ORAL DEPOSITION

OF

SHELBY D. HUNT

- - -

ANSWERS AND DEPOSITION OF SHELBY D. HUNT, produced as a witness at the instance

of the Defendant, taken in the above styled and numbered cause on the 25th day of February, A.D., 1982, at 2:30 o'clock p.m., before David M. Bingham, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Carrington, Coleman, Sloman & Blumenthal, Suite 2500, South Tower, Plaza of the Americas, in the City of Dallas, County of Dallas, State of Texas, in accordance with the Notice duly issued and the agreement hereinafter set forth.

ORAL DEPOSITION OF SHELBY D. HUNT

than just looking at it. And I would like to meet with the Touche Ross people, or at least discuss it with them on the telephone, to discuss the various theories they used. So I have not had an opportunity to do that.

Q. Based upon just what I understand from what you've said was a rather cursory review of those documents that they have put together, did you reach any conclusions at all about the viability of the theories that they used to try to determine damages under these various categories?

A. Absolutely no conclusions at all.

Q. And I take it that you haven't made any suggestions to them on changing anything, to this point?

A. Not at all. I have not talked with them at all.

Q. The ninth category was relating to the low volume, I think it's structure of -- what is the third word?

A. It's the structure of the industry.

Q. Okay. What have you determined in this area?

A. I have been attempting to get date concerning the convenience copy market, convenience copier...

market, in terms of total industry sales by the various companies in various models, in terms of the market share of Savin nationally and the market share of Savin in the State of Texas, or in the Southwest region or in the Dallas area. At the present time I have not been able to find very much information on this. It seems that the census, the United States Government, at one time did publisn information on, for example, the total sales of the photocopying industry. However the industry is now so concentrated, that is, the total sales of the industry are accounted for by so few firms, that the United States Government now refuses to publish information on sales.

Q. Do you know for a fact that that

is the reason why this publication is no longer made?

A. Yes.

Q. How do you know that?

A. That's what they say, the footnote.

Q. Footnotes to what?

A. In the census -- you have a copy of the document.

Q. Okay.

A. Likewise I asked Mr. Boyd if he would get, by interrogatory or other means, from Savin Corporation, the market share of Savin Corporation throughout...

various years so that I could attempt to examine the structure of the industry. He has lead me to believe that Savin Corporation has not been responsive to those requests.

Q. When you use the term "convenience copy market," was that the term you used?

A. Yes.

Q. -- what does that mean? Is that the under thirty, or what do you mean by that?

A. The convenience copier market, as my understanding, the term normally means copy machines that do less than thirty copies per minute, relatively low volume machines, relatively inexpensive, plain paper copier machines, in contrast to, I think the phrase

is used "the copy duplicator type machines" which are significantly faster and higher volume units, or the duplicator machines which are even higher volume yet. And it's my understanding that the Savin machines belong or compete in the lower volume thirty copies per minute or less market, inexpensive plain paper copy market. So I was particularly interested in data concerning the extent to which Savin has failed in this particular market over the various years, both nationally, State of Texas, in the Dallas area, any data that I could find...

and get. At the present time I'm having difficulty getting that kind of data.

Q. What would this bear upon among the various opinions that you are seeking to reach here?

A. Oh, I do have a -- I forgot to mention one thing that I had --

Q. Okay.

A. The information that I have been able to get so far which primarily comes from the documents we discussed before, depositions and so forth, is that Savin Corporation, starting around 1976 with the introduction of their 700 series, essentially have no real effective competitors. The machine was an outstanding machine. It was very well-received by the marketplace. It

was a very reliable machine and it was a very inexpensive machine. And that competitors' machines could not effectively compete on price, performance, reliability, with the Savin machines. Or if they could, they were going to be much more expensive than the Savin machines. This has to do -- your next question was what does this have to do with the issues and it has to do with the nature of competition in the convenience copier market, it has to do with the extent to which, for example, the State of Texas would have opportunities for not only...

several Savin dealers to compete for the State of Texas business, but other manufacturers of copy machines as well. That is, if the other manufacturers of copy machines had machines that were equivalent to the Savin, and now referring to primarily the 700 series or after the 700 series was introduced, if these other machines would compete effectively with the State of Texas, then this would be very good for the State of Texas in terms of having the opportunity of various competitors competing for their business.

Q. I take it that you are still giving consideration to these various areas and that there is the possibility that your views would be modified in some regard on these various categories?

A. That is correct.

Q. It is my desire to understand fully exactly what opinions you will be rendering in the trial of this case. Have you fully told me now today the various opinions and conclusions you've reached through today's date?

A. Yes, I have.

Q. Okay. Of course, I would prefer if there is any way to do it, to not have to go through a supplementary deposition in the event that you have reached any additional conclusions or whatever, and...

EXHIBIT W

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK Plaintiffs, V. SAVIN BUSINESS MACHINES CORPROATION, Defendant, V. AMERICAN BUSINESS PRODUCTS, INC., Third-Party Defendant	§	CIVIL ACTION NO. 3-78-0060-H

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW JAYCO SYSTEMS, INC., JIM WOZNICK, and SHIRLEY WOZNICK, Plaintiffs herein, and file this their Memorandum in

EXHIBIT W

Support of Plaintiffs' Motion for Summary Judgment and would show as follows:

SUMMARY JUDGMENT EVIDENCE

The Plaintiffs' entitlements to summary judgment as set forth in the accompanying Motion is based upon the following...

necessary for both of the Section 2 violations committed by Savin and its combination in the case at bar.

First, in the attempt offense, Jayco has set forth undisputed facts which establish:

1. Specific intent to accomplish the illegal result; and

2. A dangerous probability that the attempt would be successful.

The facts as discussed above under Savin's unlawful acquisition of the relevant State of Texas submarkets is on point. The relevant submarket is that defined by the State contracts bid for and obtained by Savin/Uni-Copy in cooperation with other Savin Dealers in 1976 and thereafter. The description of those markets is set forth in

the State of Texas contract awards themselves.

In 1975, a year prior to the activation of the Savin combination which bid on the State of Texas business, the contract category from 1 to 50,000 copies was awarded to two different contractors in various zones, rather than the entire State. A view of the 1975 bid award is set forth at P's Ex. No. 21).

In 1976, the Savin Corporation, in combination with other Savin Dealers, bid for and obtained the contract for 2,000 to 50,000 copies per month in the State of Texas. Both Xerox and Saxon were deleted from the 2,000 to 50,000 copies per month rental contract category. (P's Ex. No. 22).

In 1977, the Savin Corporation, in

combination with other Savin Dealers, bid for and obtained the contract categories including 2,000 to 75,000 copies per month. (P's Ex. No. 23).

In 1978, the Savin Corporation, in combination with other Savin Dealers, bid for and obtained the bond copier rental contracts for 1 to 75,000 copies per month. (P's Ex. No. 24).

In 1979, the Savin Corporation, in combination with other Savin Dealers, bid for and obtained the bond copier rental contract categories of 1 to 75,000 copiers per month. (P's Ex. No. 25).

In 1980, the Savin Corporation, in combination with other Savin Dealers, bid for and obtained the bond copier rental contract categories of 1 to 75,000 copiers per month.

(P's Ex. No. 26).

In 1981, the Savin Corporation, in combination with Savin Dealers, bid for and obtained the bond copier rental contracts of 1 to 75,000 copies per month. (P's Ex. No. 27).

In 1982, bid procedures were modified, and bids were returned to vendors for resubmission by early 1983. The results of those bids and awards will be made available to the Court when available. Nonetheless, the facts speak for themselves. Savin/Uni-Copy has virtually been awarded every single bid it has submitted for bond copier rental contracts since 1976. It has achieved control over the use of bond copier rental machines in volume categories of 1 to 75,000 copies per month by virtue of the com-

bination with the Savin Dealers in this State and various State officials. (Wilson Aff.; P's Ex. No. 28).

Savin has not developed sufficient outlets in its own business locations to service machines throughout the State. Thus, Savin has not had its own capability of installing machines throughout the State without the cooperation of other Savin Dealers. There has yet to be any indication of a change in Savin's policy of independent Dealers not "rocking the boat," and continuing to share profits as determined by the Savin Corporation.

There was not only an intent to monopolize this specific market on the part of the Savin Corporation, but actual accomplishment of that result.

Control over these markets has not been obtained through the conventional competitive process. Rather, it has been achieved by insuring that no competition takes place between the various Savin Dealers which completely managed and fulfilled the State of Texas contract through at least 1981. (Wilson Aff.; P's Ex. No. 29).

The relevant submarkets constituted by these State of Texas annual rental contracts are defined in the contracts themselves. Moreover, because of pricing advantages, reliability and dependability advantages, the willingness of Savin Dealers to cooperate by not competing and agreeing to allow Savin to set prices, and political ties with Trent Fowler and Robert Schneider, Savin has not only attempted to control the photo-

copier business, including open-market purchases and toner and dispersant sales, but has actually accomplished that goal.

In addition to the State of Texas bond copier rental contracts, Savin photocopiers were sold in substantial numbers from 1976 through the present date. Uni-Copy of Austin, by agreement of Savin and the other Savin Dealers, submitted all bids for Savin equipment from 1976 through 1980. In 1980, the Savin Corporation established a small corporate presence in Austin and began also submitting open-market purchase bids, with the pricing and bidding approval of Mr. Jim Lawson of Uni-Copy and Mr. Trent Fowler, a State of Texas official, who has supported, assisted and participated in the efforts of the Savin combination to retain control over

State of Texas bond copier accounts. The power to continue to control the indicated State of Texas copier business is made evident by the fact that the State of Texas has often had to pay more to purchase Savin plain paper bond copiers than normal retail customers. In Texas environments where competition occurred between Savin marketing outlets, much lower prices were available to the end user. In connection with the State of Texas business, prices would have been lower to the State of Texas had the Savin Dealers not conspired with one another.

The acquisition and maintenance of control over the relevant submarket of State of Texas bond copier contracts has been achieved through refusals to deal with Jayco, coercion from Savin management exhibited

toward Savin Dealers who dared to compet with it, termination of non-complying independent Savin Dealers, agreements not to compete with one another, agreements regarding the territorial division of the State, and agreements regarding prices at which goods and machines and supplies would be sold, rented, leased or delivered to State agencies, as well as by and through the willing assistance of Mr. Trent Fowler and Mr. Schneider, who established clandestine relations with the Savin combination and offered it contractual advantages not otherwise provided competitors. (Wilson Aff.; P's Ex. No. 29).

Mr. Fowler met secretly with Mr. Art Nendick of the Savin Corporation the night before the very first Savin bid was submitted

for the State of Texas bond copier rental contracts. Two eye witnesses have identified Mr. Fowler's secret meetings with Mr. Nendick the evening before. (Henriksen at 19-21; Mayes at 36-39). Mr. Nendick related that he had to give Mr. Fowler guarantees from Savin before giving it would get Texas' business; as Savin's "sealed bid" was not low. (Henriksen at 21).

Mr. Fowler, like Mr. Schneider, has been repeatedly entertained by Savin representatives in Austin, as well in New York and other locations. See P's Ex. No. 16. Mr. Schneider was recently terminated from his employment with the State due to his involvement in the manufacture of narcotics for distribution in the Austin area.

Both Mr. Fowler and Mr. Schneider

have offered pricing and contracting assistance to the Savin combination which was not offered to their competitors. Such assistance included not only discussing the prices at which bids should be submitted, but also giving advance notice to the representatives of the Savin Corporation of machine requests and renewal notices. (Wilson Aff.; P's Ex. No. 29). Advance notice of renewal notices would thus enable Savin to line up demonstrations with the particular agency before the bid was submitted by the State of Texas Purchasing Commission to competitors in general. Even competitor's bids were specifically discussed. P's Ex. No. 14; for example, the expense account of John Denton, one of Savin's State of Texas managerial employees, reflects a 1978 luncheon between

BEST AVAILABLE COPY

EXHIBIT W

Fowler, Schneider, Denton, and Lawson of Uni-Copy where the subject reflected on the expense voucher was "Discussed Xerox bid and get numbers."

Mr. Fowler further monitored open-market purchase requests in order that he could insure that Savin obtain most, if not all, of said bids. During this "monitoring" of the open-market purchase requests, the Savin combination submitted bids for and obtained virtually every bid award which it sought. Hundreds of the Savin 700 Series plain paper bond copiers have been sold to the State agency under the tutorage of Mr. Trent Fowler and the cooperation assistance of Mr. Jim Lawson of Uni-Copy on behalf of tne Savin combination. (Wilson Affd.; P's Ex. No. 29).

As the arrangement between Savin, Uni-Copy and the other Savin Dealers on open-market bid awards provided various profit sharing plans over the years, such profit sharing was structured in a manner that would convince participating Savin Dealers not to compete with the combination. (Henriksen at 31-32)(Dealers were paid more than they were due).

Initially, retail profits were split according to the agreement of the Savin combination in the following manner:

1. 4% to the Savin Corporation;
2. 48% to Uni-Copy of Austin; and
3. 48% to the installing dealer.

The installing dealer in the Austin and Houston area was Uni-Copy. The installing

dealer in the other areas of the State were those dealers selected by Mr. Lawson of Uni-Copy. Savin Dealers who were unwilling to "cooperate" were not allowed to share in this profit split which generated substantial sums of money. Generally speaking, about $2,000.00 was available for division among the parties on the sale of each machine.

Subsequent to the establishment of a Savin Corporate presence in Austin in 1980, the Savin representative was in charge of notifying the installing dealer. The approximately $1,000.00 payment to the Dealer was far in excess of what would otherwise be necessary in a competitive situation. The prices bid on the open-market bids were higher than would have been submitted in a competitive circumstance. In fact, purcha-

sers "on the streets of Dallas" could purchase the same machines for much less because of the more competitive pricing situation, particularly when Jayco was a Savin Dealer. (Wilson Aff.; P's Ex. No. 29).

The Savin Corporation has acquired virtually 100% of the business it sought in the relevant Texas submarkets. It not only attempted to do so, or had a dangerous probability of doing so, but accomplished its goal of obtaining control over the State of Texas business. The acquisition of the State of Texas business was a true plume in the Savin hat. It is, and has been, the major account of the Savin Corporation for many years. It was utilized nationwide in attempts to generate marketing interests for the Savin

bond copiers.

In obtaining control of these sub-markets, Savin played with "no holds barred." That reckless conduct also contravened Section 2 of the Sherman Act. Jayco, which was restrained from competing for this business, is entitled to recover its damages in the form of lost past and future profits in an amount of not less than $9,510,824.00 in connection with the State of Texas business. (Loconto Aff.; P's Ex. No. 30).

Jayco is further entitled to recover its lost past and future profits from damages in the Territory in an amount of not less than $6,761,925.00. (Locanto Aff.; P's Ex. No. 30).

EXHIBIT X

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1677

JAYCO SYSTEMS, INC.,

Plaintiff-Appellant

versus

SAVIN BUSINESS MACHINES
CORPORATION,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas

BRIEF OF APPELLANT

Samuel L. Boyd
Richard A. Valdes

BOYD & DuBOSE
3500 InterFirst One
Dallas, Texas 75202
(214) 922-0099

ATTORNEYS FOR APPELLANT

EXHIBIT X

The State of Texas copier contracts similarly constitute a relevant sub-market for antitrust analysis. Sealed competitive bids were annually submitted to central purchasing for all of the State of Texas agencies. The lowest "cost per copy" for each copier volume category was entitled to the bid award.

Furthermore, the successful bidder generally had an exclusive right for the entire year. The Savin combination which dominated this market, placed approximately 2,000 copiers with State agencies under rental contracts, alone, by the year 1979. Ms. Mary Wilson testified in her affidavit that Savin also controlled about 95% of the open-market copier purchases by the State of Texas. (Wilson Aff.; Rec. at 1423).

Savin controlled the following

annual rental contracts with the State of Texas:

1976 -- 2,000-50,000 copies per month
1977 -- 2,000-75,000 copies per month
1978 -- 1-75,000 copies per month
1979 -- 1-75,000 copies per month
1980 -- 1-75,000 copies per month
1981 -- 1-75,000 copies per month

(Plaintiff's Appendix to Supplementary Brief, Record "PP", Exhibits Nos. 22-27).

The record makes evident that the Savin combination willfully established and maintained a monopoly of the State of Texas copier business. Because of this monopoly, Ms. Wilson was successfully bidding Savin photocopiers to the State of Texas at a price as much as twice the competitive price for

the same machines in the general retail marketplace. (Wilson Aff.; Rec. at 1419).

EXHIBIT Y

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAYCO SYSTEMS, INC., JIM WOZNICK and SHIRLEY WOZNICK Plaintiffs, V. SAVIN BUSINESS MACHINES CORPROATION, Defendant, V. AMERICAN BUSINESS PRODUCTS, INC., Third-Party Defendant	§	CIVIL ACTION NO. 3-78-0060-H

DATE: July 13, 1982

REPORTER: RANDALL N. FINCH, C.S.R.

ORAL DEPOSITION

OF

JAMES PAUL LAWSON

ORAL DEPOSITION OF JAMES PAUL LAWSON

Uni-Copy. There are five different zones within the state.

Q. Okay. Well, explain to me how the bid process works. You're explaining the zone situation.

A. Okay. You have five different zones. You may bid equipment or you may bid supplies for anyone or all five of the zones at any time that a contract is bid. And you can sit and bid Uni-Copy Austin for zone one, which is Austin. And it covers, I believe, San Antonio and the valley.

Q. Okay.

A. In that particular zone. You can bid Uni-Copy Houston for zone five, which would be Houston, I believe -- well, hell, I'm not sure what the zones are now, but there's maps over at the Purchasing

Commission that give all the various five zones.

Q. Okay. So how did that affect the rest of the state?

A. In what way?

Q. Well, I understood you to say that you bid the whole state, you understood, at one time, either '77 or '78?

A. Yes, by the zones, as I say, and bid for Uni-Copy Houston.

Q. What about Dallas, for instance? You had --

A. Dallas was Quisenberry.

Q. Okay. Well, who bid it?

A. I think I bid it.

Q. Okay. Okay. Did you have his approval to do that?

A. Of course.

Q. Okay. Is it the same with the other zones that your own business didn't take care of? I mean did you get the approval of the proprietors in those locations to bid the zones?

MR. BRYANT: Object to the vague and ambiguous question.

THE WITNESS: If I bid for Houston, of course, I talked to the people from Houston first, naturally.

QUESTIONS BY MR. BOYD:

Q. All right. Is there anybody that you placed a bid for for the State of Texas in either '77 or '78 that you did not previously obtain approval from?

A. For the supplies?

Q. Yes, sir.

A. Not that I know of.

Q. Okay. Now, then, in connection with those bids --

MR. ALEXANDER: Excuse me a minute.

MR. BOYD: Let me ask one more question if I can. In connection with those bids, how did --

MR. BRYANT: Well, let him confer with this counsel --

MR. BOYD: Well, just a second, just a second, before we even have a conference, just a second. We are supposed -- we are now -- please note on the record we're having a little conference

between counsel and his client. But this is supposed to be taken just as if the testimony was being given in court. And counsel, if the testimony was being given in court, would not be allowed to approach the witness stand and confer with his witness.

MR. BRYANT: I'm unaware of any deposition that has been taken in this case where you had a client where you weren't whispering in your client's ear on virtually each and every question --

MR. BOYD: Now, Mr. Bryant --

MR. BRYANT: -- and I think it's a little out of line for you not to allow him to consult with his attorney.

MR. BOYD: That was pure affection. That was pure affection. No words at all, just straight affection.

THE WITNESS: Well, I'm beginning to worry about you.

QUESTIONS BY MR. BOYD:

Q. All right. Now, then, in connection with submitting Mr. Quisenberry's bid or whoever else that you might have submitted, how did you determine the price? Did

you get approval from them on the price before you submitted it?

A. No.

Q. You didn't or did? Did you submit --

A. Off the record.

Q. Well, just a second, before we talk off the record now, hold it, hold it. If you're -- if you don't understand the question, I want you to ask me to rephrase it. If your counsel has an objection, I want him to pose the question. And now let's call the judge before we even have a conference with our client, if every time...

we've got a question, we've got to have a conference with our client.

THE WITNESS: Well, I think we are still going back to the same question you was asking before or something.

MR. BOYD: Yes. That's right. You've already answered the question. I'm just asking you specifically -- and, Mr. Alexander, if you have an objection to my question, you may state it on the record.

MR. BRYANT: He is entitled to confer with his client.

MR. BOYD: He is not entitled under the rules -- This is

a very important question, and you know this is important, Mr. Alexander, and I'm making a point of it so the judge over there understands what's going on. This is the crux of the whole case.

MR. ALEXANDER: Well, I think all your questions are important, Mr. Boyd, but I'm going to object to this last one as being vague and misleading.

MR. BOYD: Good. All right.

MR. ALEXANDER: I'm going to instruct him not to answer until I can confer...

with him about potential meanings of that question.

QUESTIONS BY MR. BOYD:

Q. All right. I'm going to ask the question one more time, and this will be on the record, which can be read into Court.

Did you -- and you tell -- you instruct him so we have the record clear. Did you, in seeking or getting the approval to submit the bid for Quisenberry's area from Quisenberry, did you also determine at what price he wanted to submit the bid in any way?

MR. BOYD: You instruct him and it's going to be read to the jury.

MR. BRYANT: What year is this?

EXHIBIT Y

MR. BOYD: 1977 and 1978.

QUESTIONS BY MR. BOYD:

Q. In obtaining the approval to submit the bid for Mr. Quisenberry for his area of the state, did you or did you not get approval for the price from Mr. Quisenberry to be submitted?

MR. BRYANT: Have we determined that, in fact, there was a bid submitted in '77 or '78?

MR. BOYD: I hope you listen. I hope you listen.

MR. BRYANT: I am, too.

MR. ALEXANDER: I'm going to object to the question. I'm unclear as to the meaning which is--

MR. BOYD: In what way?

MR. ALEXANDER: Well, in terms of the submitting a bid for Mr. Quisenberry's area.

MR. BOYD: Okay.

MR. ALEXANDER: First of all --

MR. BOYD: Let me rephrase it. Let me rephrase it, Richard, because I know you understand where we are.

MR. ALEXANDER: Well, I resent your insinuations that I

understand anything. I understand that this question is misleading --

THE WITNESS: First off, I think what you're trying to do is get to where, did I try and rig bids or price-fix.

MR. BOYD: No, I'm not asking you if you rigged -- I'm asking you, did you not say a moment ago, sir -- did you not say a moment ago that you obtained approval from Mr. Quisenberry to submit a bid for his area? Did you not say that?

MR. ALEXANDER: Okay, I don't think

he said that, but --

QUESTIONS BY MR. BOYD:

Q. Did you say that? The record will be what it is.

A. I said, number one, that prior to ever -- whether it be a bid or a machine going in or supplies or anything else, I let the people know what is going on within that area that they're going to be receiving the machine or supplies will be coming in.

Q. Okay. Now then, I want to go back specifically to my question a moment ago, and this court reporter has got a tape recorder and he also took it down, so we're going to know the exact words that were spoken. And what I'm asking you is this: I asked you a moment ago how you bid the entire

state, and did you not say that in connection with bidding the entire state, you bid toner dispersant for particular zones for particular dealers? Did you not say that?

A. No for dealers, no, I did not.

Q. Who did you bid it for?

A. I said I might have bid for Houston.

Q. Okay.

all. It's that simple.

Q. Why did you need Quis' approval?

A. Because if the man is going to service the area, he's got to know that something is coming in there, doesn't he?

Q. I understood you to say -- and correct me if I'm wrong -- that you submitted a bid for his company for that area.

A. I submitted the whole bid, yes.

Q. Okay. Now then -- and I understood you to say that you got his approval before you submitted a bid.

A. Yes, I said he would service it.

Q. Okay. And are you telling me that you had the right to select the price at which his bid went in?

A. I would think so.

Q. Okay.

MR. ALEXANDER: I object to that question. I object to the phrasing and I object to the response.

MR. BOYD: Okay.

THE WITNESS: Now, Rick and I are going to sit and talk, now that you've got your question --

MR. BOYD: Y'all may go ahead and chat a little bit, if you want to take a break or whatever.

(At this time there was a brief recess taken, after which the deposition continued as follows:)

QUESTIONS BY MR. BOYD:

Q. Counsel and his client have had a chance to confer during the break and we're now back on the record.

Mr. Lawson, I understood you to describe somewhat the break, if you will, on the rental commissions that were earned under the State of Texas contract for the rental of Savin equipment. But I understood you to tell me that $50, approximately, as best you

remember, went to the dealer, which left -- and $40. for installation or thereabouts went to the dealer, which left $70 per month to go to Savin, with whatever they wanted to do with it. I understood you to earlier say in this deposition something about the fact that you coordinated the state business?

A. That's correct.

Q. Okay. Now, I want to make sure I...

understand, then, for a machine that was installed under the State of Texas bond copier rental contract, in 1977, in the City of Dallas, by either Mr. Quisenberry's company or the Savin branch, Uni-Copy made no money on that installation or on the contract itself?

A. Now, Uni-Copy received a coordinating fee.

Q. Okay. What was the coordinating fee?

A. Oh, Lord.

Q. About five dollars a machine?

A. I'm trying to remember if it was four or five. I think it was five a machine. About -- yes, it was five.

Q. Okay. Do you recall approxima-

tely how long that arrangement lasted where Uni-Copy of Austin received a $5 per machine coordinating fee?

A. I believe it was until 1979.

Q. Could it have been --

A. It may have been '80. It may have been '80. I'm trying to remember. '79 or '80, one of the two.

Q. Could it have been early 1980 when the Savin corporate put an office in down here...

to run the state contract?

A. Well, they opened an office in Dallas before that.

Q. Okay.

A. Six or eight months. I don't remember if that -- if that's what caused it or if it was when they opened the office here, I'm not sure. It was one of the two.

Q. Okay. All right. Did you ever -- we've talked about these dealers and their relationships to Uni-Copy and Savin for the placement of machines, how much they got off the contract as you understood it, and the bid submission on toner dispersant and ways that you've handled that. In subsequent years or prior that, prior to 1977, '78, did you submit any bids for Savin?

A. Prior to '77?

Q. Or thereafter. At any time.

A. Well, sure.

Q. Okay. What kind of bids would you submit for Savin?

A. Open market for machine purchase or even if it was a non-contract rental, a reduction type copier or something like that.

If it was a reduction type copier, then it was on a rental, wasn't on a contract, just an open market rental purchase or rental agreement.

Q. Okay. That's for the corporate -- corporation you submitted bids?

A. Uh-huh.

Q. Okay. How did you determine at what price the bids would be sumbitted?

A. I tried to use GSA pricing that was available, and I would once again study competition, do my best. I used to attend every bid opening, log in who bid what, what they bid and what was going on in the market place.

Q. Is rentals the only thing that you ever bid for Savin?

A. I bid purchases also.

Q. Okay. All right. Well, you say you bid purchases. Would you describe for the court and the jury what purchases are?

A. Purchase of a copy machine.

Q. Okay. We've been talking at some length over what bond copier rental contracts are and how they operate.

A. Uh-huh.

Q. Okay. Now we're talking about

purchasing, so would you please state for the jury the way in '77 and thereafter, when you came aboard, purchasing was handled in those cases in which you bid for Savin? What would you do, on other words?

A. Well, I would go out, number one, to try to sell a piece of equipment to an agency, for example, whether it be local or if they were going to -- once again, TDHR put in machines in Houston or someplace else, take their interest in the equipment. They would then put a requisition in for invitation to purchase and invitation to bid, submit a sealed competitive bid.

Q. Who would submit the sealed competitive bid?

A. I would.

EXHIBIT Y

Q. Okay. And what made you decide to submit the bid for the Savin Corporation?

A. Well, it was my job.

Q. Did you ever submit bids for Uni-Copy on those --

A. Of course.

Q. -- purchases?

A. Sure.

Q. Did you sometimes submit bids for both Savin and for Uni-Copy on the same equipment?

A. On the same equipment?

Q. Yes, sir.

Q. Let's say we have a requisition or a purchase order for four on the open market.

A. No, I would not submit a bid for Svin and Uni-Copy at the same time, no.

Q. Okay. Okay. How did you determine whether to submit a bid on an open market purchase, for Savin, the corporation, or to submit one on behalf of Uni-Copy, for Savin equipment?

A. Normally when I would write, we got our bid in, it stated Uni-Copy -- the bid

came to Uni-Copy. I would write Savin C & D on it.

Q. Okay. Now, when you made the bid on behalf of Uni-Copy and not on behalf of the Savin Corporation?

A. I still wrote in the Savin C & D.

Q. Oh, you did?

A. Yes, sir.

Q. Was it the same profit split either way?

A. Oh, if the machine went here into Austin, of course, all the profits that were due to Savin or due to Uni-Copy went to Uni-Copy. If it was a machine that went out of the city of Austin into another area, then Savin paid us our commission on part of it and the installing dealer the other part.

Q. Okay.

A. The same as Saxon did.

Q. Okay. Well, what I'm trying to get straight -- and I'm not clear, I apologize -- is that sometimes you submit the bid in the name of Savin Corporation, sometime you submit the bid in the name of Uni-Copy.

A. The bids always came in to Uni-Copy initially, because Savin's name was not on there. They had the -- the Uni-Copy

name on it. I would write in Savin C & D on it and submit the bid, whether it be for Austin or for out of town. The bid would come back sometimes saying Uni-Copy care of Savin C & D, Savin C & D care of Uni-Copy. How the person and the commissions -- sometimes they kept them straight, sometimes they didn't.

Q. Okay.

A. Now, when the machine went out of the City of Austin, out of our particular delaer territory, the installing dealer received his commission and we received part of the commission also for doing the coordinating, for doing the bidding, for doing the work.

Q. Okay.

A. And we probably worked up, I would say, 70 to 80 percent of the machine orders out of there, being in the capitol and working with the various department heads.

Q. Okay. In talking about the percent of orders for Savin equipment, what percent do you think you obtained the bids when Savin equipment was sold?

A. I have no idea.

Q. Anything less than 98 percent?

MR. BRYANT: I didn't understand the last question. What was less than --

QUESTIONS BY MR. BOYD:

Q. I mean did you virtually -- every time Savin equipment was selected for an open market purchase, did you virtually every time get the bid?

A. I tried to get the bid. You're darn...

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right, that was my job.

Q. All right. Are you aware of any other bids that beat you out where Savin equipment was selected on the open market?

A. Yes.

MR. BRYANT: What is the time frame on this?

MR. BOYD: 1977 and thereafter.

QUESTIONS BY MR. BOYD:

Q. Was it often that you were beat out?

A. Hopefully not often.

MR. BRYANT: Just a minute. Just a minute. I want to make sure I understand what the question is. Is this question --

did I understand you to say this last question is 1977 and anytime thereafter?

MR. BOYD: And thereafter.

MR. BRYANT: Okay.

THE WITNESS: Once again, hopefully not often, but yes, there were some that we lost.

QUESTIONS BY MR. BOYD:

Q. Do you have any records on the ones you lost?

A. I wouldn't have any record of it. Why would I?

Q. No, I just wondered if you kept any kind of record on competitors that --

A. I used to keep a total running log at all times of all bids. But since I haven't done that much bidding for them in the last three years, two and a half years, I see no....

Q. Okay. Now, if an agency in Dallas wanted to purchase four machines, four bond copiers on the open market, and Savin equipment qualified for the specs -- let's presume that first. Trying to understand your procedures. And the state would contact you and other vendors and request bids, sealed bids for that, is that generally what happened?

A. They would mail out invitations

to bid.

Q. All right. Now then, and I understand you to be saying that in those situations, if four machines went into Dallas, somewhere in Dallas, open market requisitions, that the profit -- now, how do you figure that the profit would be disposed of by half to the installing dealer and half to Uni-Copy? How was the profit itself figured? What are you talking about? Would you please define it?

MR. BRYANT: Wait a minute. I don't understand the question. The question started out what if the state wanted to bid on four machines in Dallas, and the question winds up being as how did you determine a profit --

MR. BOYD: Yeah, it's late in the day. Let me restate the question so Mr. Bryant understands it.

QUESTIONS BY MR. BOYD:

Q. In the event four machines were being solicited for open market purchase, for an agency in Dallas, in that event, I understood you to say if the bid wa successful down here in Austin for some Savin equip-

ment, that you would split the profit with the installing dealer in Dallas, whoever it happened to be. Yes or no.?

MR. BRYANT: I object.

MR. ALEXANDER: Let me object to that. What are we calling profit?

MR. BOYD: That's what I'm going to ask him. I heard him say that a minute ago, half the profit goes to the installing dealer and half to Uni-Copy if it was in another part of the state other than Austin.

MR. ALEXANDER: I understood him to say that --

MR. BOYD: Well, let me rephrase it, and then we won't have any problem.

QUESTIONS BY MR. BOYD:

Q. Do you recall a few moments ago describing to me what happened on an open market sale, if the sale was here in Austin?

A. Yes.

Q. Do you recall making the statement?

A. Yes, sir.

Q. Okay. Now, what do you recall saying, so we are all clear at this time?

A. If the machine was sold here in Austin --

Q. Okay.

A. -- that the normal profit that would go to the dealer would come to Uni-Copy.

Q. Okay. Now then, how was that profit -- the normal profit, what do you use to determine that?

A. I don't determine it. Savin determines it.

Q. Okay. Do you know what figures were utilized in order to determine what the normal...

profit was, for the split?

A. I would think it was the cost of the equipment versus what it sold for. Same as anything else. If you have a $10 item and you sell it for $14, you've got a four dollar gross profit.

Q. Okay. Remember, not only the lawyers are a little unfamiliar with this process, which is very complicated, but also the members of the jury. That's the reason why I'm asking you to be very basic in your explanation.

A. I think you stated also half of it, and I don't recall saying half of it, because that was not necessarily true.

Q. Okay. Okay. Let's go back to '77 and '78, that time frame so we're absolu-

tely certain. I've just understood what you said happened if the sale was in Austin on the open market for Savin equipment here in Austin.

Now, in determining what the profit was, I understand you look at the cost and you look at the sale price. Do you mean by the sale price you look at the bid price that's reflected on the bid submitted?

A. That's correct.

Q. You have to answer for the court reporter.

A. Yes, sir.

Q. And the cost. Who determines what the cost is?

A. Savin corporate, their selling price to the dealer.

Q. Okay. There are different volume prices in numbers of units. In other words, if a dealer purchased one or purchased 50, there's a different price. There has been in the past.

A. There used to be. I don't know when that -- that went out sometime ago, I don't remember when.

Q. Okay. In '77 and '78 it existed, did it not? Volume discounts? Or

do you remember?

A. I don't know that it did in '78. I think it did in '77. Once again, I'm not --

Q. Okay.

A. Calling on -- on --

Q. I appreciate your trying to remember.

A. I'm not sure.

Q. Okay. At one time, then, the cost was a function of how many you purchased, and at...

meeting.

Q. Do you have --

A. Mary Wilson I think was there.

Q. Okay. Do you know if Mr. Fowler has participated in training sessions since 1977 for any other photocopier vendor?

A. I have no idea. I believe that -- it wasn't Fowler, I think that was Schneider that made a trip with Mary Wilson to Chicago for A.B. Dick. In fact, I think they go snowed in up there together.

Q. In order to influence State of Texas officials Mr. Lawson, have you developed personal relationships with any of the purchasing people?

A. Yes, I've become friends. I don't call it personal relationships. I've

become friends with everybody -- and, you know, if you're going to spend six or seven years working with people, whether it be state, federal, commercial or whatever it is, if you can't develop a rapport and develop some type of friendship, then you're a damn poor sales person and ought not be out there.

Q. Did you develop any particular..

(5)

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No. 85-1856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAYCO SYSTEMS INC.,

Petitioner,

v.

SAVIN BUSINESS MACHINES CORPORATION,

Respondent.

BRIEF IN OPPOSITION

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No. 85-1856

In The

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October Term, 1985

Jayco Systems, Inc.,

Petitioner,

v.

Savin Business Machines Corporation,

Respondent.

BRIEF IN OPPOSITION

LISTING OF PARENT AND SUBSIDIARY CORPORATIONS

Respondent Savin Business Machines Corporation was a New York corporation. It merged into Savin Corporation, a Delaware corporation, in 1978. Its parent corporation is Canada Development Corporation. The subsidiaries of Savin are Savin Canada, Inc., Savin Technologies, Inc., Magnetic Laboratories, Inc. and Savin of Tampa, Inc.

STATUTES AND RULES INVOLVED

15 United States Code § 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

15 United States Code § 2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the States or with foreign nations . . . ."

Rule 56, Federal Rules of Civil Procedure

* * *

"(c) Motion and Proceedings Thereon . . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

STATEMENT OF THE CASE

Jayco and Mr. and Mrs. Woznick instituted this lawsuit on December 8, 1977 in state court in Dallas County, Texas asserting claims for alleged breach of contract, misrepresentations, and deceptive trade practices. Thereafter, the case was removed to federal court and Savin's action against Jayco for $68,000 of unpaid invoices for open account purchases was consolidated into the present action as a counterclaim.

Despite Jayco's present protestations that Mr. Woznick was outraged by the conduct of Savin in 1976, it was not until the Third Amended Complaint, filed March 24, 1981, and the Fourth Amended Complaint, filed through Motion of July 8, 1981 with Order Granting Leave dated September 21, 1981, that Jayco first asserted violations of federal antitrust law relating to the State of Texas business. Savin has denied that the alleged antitrust conspiracies existed and challenged the standing of petitioner to assert Sherman Act claims.

The summary judgment process below has been quite extended. Savin first moved for summary judgment on August 11, 1980, and, by Order and Memorandum Opinion dated March 2, 1981, the Honorable Barefoot Sanders granted summary judgment in part dismissing certain state law claims with prejudice and dismissing other claims, including federal antitrust claims, with leave to amend. After such amendment, Savin filed a Second Motion for Summary Judgment on December 7, 1981, and on April 19, 1983, Jayco and the Woznicks filed their own Motion for Summary Judgment.

Judge Sanders, by Memorandum Opinion and Order dated January 24, 1984, reiterated his prior grant of Summary Judgment as to a number of the Jayco claims and granted leave for ten days to supplement with facts claims for unfair competition and trade defamation. Oral argument was set for the balance of the claims in the Fourth Amended Complaint then the subject of the motion, including the claims for violations of Sections 1 and 2 of the Sherman Act. Judge Sanders, after extensive oral argument and briefing, granted summary judgment with regard to the antitrust claims and certain other claims. The parties negotiated a Compromise and Settlement Agreement which disposed of the balance of the claims. On July 6, 1984 the Final Judgment was entered by Judge Sanders dismissing the Jayco claims in the Fourth Amended Complaint for alleged Sherman Act violations, with the right of appeal being preserved, and dismissing all other claims pursuant to the Settlement Agreement of the parties.

The Fifth Circuit, on appeal by Jayco of the antitrust determinations, affirmed the lower court for the various reasons set forth at *Jayco Systems, Inc. v. Savin Business Machines Corporation*, 777 F.2d 306 (5th Cir. 1985). Rather than responding to arguments that were not addressed by the district court or the Court of Appeals, Savin shall confine its discussion to the grounds of the decisions below. The Petition for

Writ of Certiorari of Jayco shall be cited as (Pet.) and exhibits in the Appendix of petitioner shall be cited (Pet. App. Exh.).

SUMMARY OF THE ARGUMENT

This is a fact specific summary judgment case. The summary judgment on which review is sought was granted by the Honorable Barefoot Sanders after he presided over the case for almost seven years. Judge Sanders ruled only after an exhaustive review of the large record in this case and the plethora of legal theories urged by plaintiffs. Judge Sanders fully examined the numerous depositions, affidavits, and briefs directed to the summary judgment issues. His grant of summary judgment in favor of Savin was followed by a similarly exhaustive review of the record by the Fifth Circuit Court of Appeals, which affirmed. Both lower courts indulged every required presumption in favor of Jayco and some that were not required.

Savin brought before the trial court the most potent of summary judgment evidence — documents generated by Jayco's owners in the crucial year 1976 and admissions by the participants in Jayco during the early years of discovery in this case. In opposition Jayco has filed conclusory, self-serving affidavits, often containing calculated ambiguity, trying to negate the earlier admissions of the affiant.

In requesting a writ of certiorari, Petitioner Jayco does not seek to have this Court resolve a conflict of views between Courts of Appeal on antitrust issues, or correct a divergence from antitrust law as established by this Court, or even to instruct the Fifth Circuit in proper application of the rule of civil procedure relating to summary judgment. Instead, Petitioner in truth is asking that this Court's limited time be spent in reviewing the admissions made by the principals in Petitioner to determine if they are only "white lies" as claimed by

Petitioner's counsel that should somehow be ignored, or are admissions that may underpin a summary judgment. Petitioner has further totally failed to define the relevant market, particularly the geographic market, and demonstrate the facts necessary for a Sherman Act § 2 monopolization claim.

ARGUMENT AND AUTHORITIES

This is a summary judgment case. Although the claims on appeal below were antitrust claims, no antitrust issues are truly involved in this Petition since the bulk of the Petition merely complains that the courts below came to the wrong conclusion in applying the law to the summary judgment evidence.

Similarly, while Petitioner asserts the Fifth Circuit applied a "new Rule 56 standard" in reviewing the summary judgment, the arguments in support of such claim are simply a rehash of the evidence in the summary judgment record, followed by the conclusion that the Fifth Circuit should not have held the way it did. This case simply does not involve any issues of antitrust or summary judgment law, nor a departure from the "usual and accepted course of judicial proceedings" and therefore does not warrant a review on a writ of certiorari.

This Court should be aware that the Petition often misquotes the Court of Appeals opinion, most frequently by taking the Fifth Circuit reiteration of Jayco's position and referencing that as if it were a finding of the Court of Appeals. For example, Jayco states "The Court of Appeals recognized the Model 300 as the copier industry's version of the Edsel." (Pet. 11, fn. 5). The Court of Appeals did no such thing. It said "The original dispute arose from *Jayco's belief* that Savin had fraudulently burdened Jayco's new dealership with the copying industry's version of the Edsel. . . ." (emphasis added). 777 F.2d at 308.

Likewise, Jayco misstates the Court of Appeals opinion when it claims: "Finally, this is not a case in which the Court of Appeals has questioned the existence of an anti-trust conspiracy. To the contrary, the Court below noted that the facts presented 'a fertile field to hoe'." (Pet. 23) What the Court of Appeals actually said was "After a thorough review of the record, we conclude that although the facts *might* provide *another* a fertile field to hoe, the plaintiff here is left without even a stump to stand on." (emphasis added) 777 F.2d at 308. In its pastoral metaphor the Court of Appeals was simply acknowledging that some other company *might* have standing or *might* be able to define a relevant market. It did not find a conspiracy.

This Court is urged to review with special care Petitioner's various references to the Court of Appeals opinion and characterizations of it.

I. Intent and Preparedness

A. Law on Intent and Preparedness

Petitioner first complains of the Fifth Circuit's holding that it lacks antitrust standing because the claimed injury is damage to a theoretical and highly implausible business expansion by Petitioner. However, the standard which petitioner must meet to raise this claim is well established and not disputed by Petitioner.

In *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed 2d 129 (1969), an American manufacturer of television sets complained of the exclusionary activities of a research company and its "patent pools" in Canada, England, and Australia, alleging that the pools' refusal to sell patent licenses to the American company and certain other acts prevented it from expanding its business into those countries. The Court noted the threshold inquiry to be as follows:

> [T]he issue is whether . . . Zenith wanted and intended to enter [the English market], had the capacity to do so, and was prevented from entering by its inability to secure a patent license and by other operations of the English patent pool. Section 4 of the Clayton Act required that Zenith show an injury to its "business or property by reason of anything forbidden in the antitrust laws." If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of HRI's unlawful conduct, Zenith would not have met its burden under Section 4.

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. at 126-27. (citations omitted).

Put another way, Petitioner must show both (1) intent and (2) preparedness to enter into the new market but for the claimed illegal activity of Savin. *Hayes v. Soloman*, 597 F.2d 958, 973 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Martin v. Phillips Petroleum Company*, 365 F.2d 629 (5th Cir. 1966), *cert. denied*, 385 U.S. 991 (1966). Among the factors relevant to an assessment of preparedness are the following:

> The ability of plaintiff to finance the business and to purchase the necessary facilities and equipment; the consummation of contracts by the plaintiff; an affirmative action by plaintiff to enter the business; and the background and experience of plaintiff in the prospective business.

Martin v. Phillips Petroleum Company, 365 F.2d at 634 (citations omitted).

Significantly, Petitioner does not dispute the above law as applicable to this case, nor its obligation to show such preparedness in order to overcome Savin's Motion for Summary Judgment. Petitioner complains only that the courts below made the wrong finding. In fact, the findings of the

courts below were based on a thorough review of the entire record, are well reasoned, and are correct.

B. Summary Judgment Evidence Concerning Preparedness and Intent

The summary judgment proof demonstrates that Jayco has totally failed to create any legitimate fact issue concerning intent or preparedness. The trial judge found that summary judgment was required because of the lack of intent and preparedness. The Fifth Circuit was satisfied to rely only upon the lack of preparedness as to the statewide rental bidding. On either or both bases, however, summary judgment was properly granted.

In order for Jayco to be prepared to make the statewide bid for rental machines that it asserts it desired, it would have required at least the following:

(1) Sufficient machines to make a statewide bid;

(2) 100% financing of the machines to put out on rental;

(3) An Austin office due to the concentration of machines that would be in the Austin area; and

(4) A servicing and installing agreement with other Savin dealers throughout Texas.

The intent of Jayco at the relevant times of May, 1976 and thereafter may be gleaned from the actions of Mr. and Mrs. Woznick since Mr. Andreff had left the organization by that time.

(1) Jayco, Through its Principals, Has Admitted Lack of Preparedness and Intent

Although Jayco has feebly attempted to avoid summary judgment through last minute self-serving and conclusory affidavits, the documents generated in 1975 and 1976, together with admissions made in depositions of Mr. and Mrs. Woznick in this case before their counsel realized the impact of the admissions, conclusively demonstrate the true state of affairs concerning the lack of intent and preparedness of Jayco in 1976. For example, Mr. Woznick sent a letter to Savin dated July 8, 1976, in which he stated that even if the 750 model machines were in ample supply, and he could get them, that he was not in a position to put the machines on rental. (Pet. App. Exh. R.) Mr. Woznick did not intend to engage in rental programs, local or statewide, because of the capital outlay which would be required. Jayco had been losing money and a conservative businessman such as Mr. Woznick was not interested in such expansive activity, particularly after Mr. Jerry Andreff left Jayco in the spring of 1976. Mrs. Woznick acknowledged, in one of her depositions, that the reason for the split between her husband and Mr. Andreff was that Mr. Woznick was a conservative businessman who wanted to "creep" and go "slowly" rather than engage in expansions that would require extensive financing, as desired by Mr. Andreff. It is preposterous for Jayco to assert that Mr. Woznick would have made a statewide bid and signed promissory notes for $400,000 in 1976, particularly after Mr. Andreff left. In fact, Mr. Andreff told the Republic banker, Mr. Bishop, that in the spring of 1976, the Woznicks were desirous of retiring and going back to Tennessee since they did not like the photocopy business. This is hardly the state of mind which would have been necessary to engage in the statewide rental bidding process that Jayco now claims it desired.

In addition, Mr. Woznick admitted in a deposition that when he met with a Savin representative and various dealers in the Summer of 1976, concerning the installation and servicing to be done pursuant to Savin's successful state bid, Mr. Woznick declined to have any involvement with the installation and servicing of the machines because he and Mrs. Woznick "had all [the business] we can handle." 777 F.2d at 312.

A further vital and undisputed fact demonstrating lack of intent and preparedness was the fact that when Jayco made a bid in 1975, at a time which it does not claim it was hindered through lack of machines or any other alleged antitrust violation by Savin, Jayco only bid for the rental of machines in zone 4, the Dallas/Ft. Worth area. This was prior to additional losses and prior to the departure of Mr. Jerry Andreff. That bid was unsuccessful. There is no reason to believe that Jayco would have taken substantially greater risks after its more liberal participant had left the company and after additional losses had mounted by the time of the bidding in 1976.

(2) Jayco does not have a History with the State of Texas Indicating Preparedness

Jayco seeks to convince this Court that it had an established history with the State of Texas which would reflect an intent and preparedness that would satisfy those requirements. In fact, the company had no business of the type upon which it bases its current claim. The transaction in 1975 involving approximately 60 machines was a *sale* of Canon copiers that did not require any financing and indeed was on the basis that Jayco was paid by the State of Texas prior to being required to pay its manufacturer and supplier, Canon. Also, such sale did not require Jayco to go to independent dealers and establish a servicing network, nor establish an Austin office.

In fact, Jayco had never been successful in making any zone or statewide rental bid, since it failed in the limited zone 4 bid

made in 1975, as described above. Simply put, Jayco was a company of limited means which could not remotely consider a statewide bid and its history is inconsistent with the assertion that it would have done so had it been given sufficient machines in 1976.

(3) Supply of Machines

The events that transpired in 1976 and thereafter show that hundreds of 750 model machines were needed to meet the State of Texas requirements. Assuming that Jayco requested the machines, Jayco still has failed to demonstrate any reason why Savin would have been required to guaranty, on an unlimited basis, machines for Jayco to bid while denying equivalent machines to the other dealers. In light of the shortage of machines and the time frame in question, a guaranty for Jayco would in effect have been giving extreme favoritism to Jayco over the other dealers, which is not required by the antitrust laws.

(4) Financing the Machines

(a) *The Deposition of Mr. Bishop*

Jayco made no attempt to line-up the 100% financing that would have been necessary to bid and, even had it attempted, it would have failed. The summary judgment record includes the deposition of Mr. Bishop, an independent third-party witness, who was the group manager of the Commercial Loan Division and formerly a commercial loan officer at the Republic National Bank. Mr. Bishop was approached in the spring of 1976, shortly before the bid in question, by Jerry Andreff, vice president of Jayco, who was seeking an $86,000 loan for himself and Jayco to enable him to acquire Jayco from the Woznicks. The testimony of Mr. Bishop is significant for a number of reasons. First, the $86,000 loan was denied, in part because of the weak financial status of Jayco, whose assets

were to be the collateral for the loan. Mr. Bishop, who was faced with the lending decision in 1976, together with other Republic Bank personnel reviewed the Jayco balance sheets for 1974 and 1975, Mr. Andreff's personal balance sheet, Mr. Woznick's personal financial statement, and the other documentation furnished by Mr. Andreff. An independent credit check by the Republic established that Jayco was over $86,000 in arrears to Canon and approximately $90,000 behind in its payments to Savin. Mr. Bishop indicated that he would have denied the $86,000 loan if Mr. Woznick's credit been added to Jayco's. In light of his review of the actual facts at the time, Mr. Bishop stated that a loan of the type needed for the State of Texas business, if requested, would not have been considered favorably.

These determinations are not surprising in light of the fact that Jayco had lost money continually throughout its operations up to that time and also had serious liquidity problems.

(b) The Colleen Collins Affidavit Is of No Import

Petitioner complains that the Fifth Circuit spurned the Affidavit of Colleen Collins, a former bank officer, on the issue of whether Petitioner had the ability to raise the necessary capital to enter the new market. On its face, however, and especially in conjunction with other undisputed facts in the summary judgment record, this affidavit fails to raise a fact issue.

First, it is undisputed that Ms. Collins was never actually approached by Petitioner for a loan. Her affidavit is based on a review of selected and incomplete information (and unidentified statements from plaintiffs) submitted to her long after the fact, which included information which was *not* available at the time the loan would have been necessary, including data on how many copier machines were actually placed by Savin *after*

its bid and the revenues it actually obtained during the time period long *after* the loan in question would have been made.

Second, Collins' evaluation and opinion are particularly suspect because petitioner withheld key financial information from her. Collins' assumption that Jayco had an "excellent" credit history was a false assumption. Jayco had been continually behind in note payments and open account purchases and in early 1976 owed Canon $86,770 and Savin approximately $90,000. Also, she apparently was not made aware of the continuous annual losses of Jayco from its beginning to the date of the hypothetical loan request. She was not advised of the need for an Austin office to make the bid, or that the machines were returnable on 30 days' notice, or that winning the bid and acquiring the machines did not assure the placement of a single machine. Her affidavit is incurably faulty and does not properly join issue with the testimony of Mr. Bishop.

Petitioner takes exception to the Court of Appeals comment that the Collins affidavit was not tested by cross-examination. (Pet. 27) Jayco asserts that "Savin failed to subject her opinion to cross-examination" and that "[i]t is preposterous that Savin should be rewarded for not deposing [Jayco's] expert." (Pet. 27)

The Court's point undoubtedly was simply that Ms. Collins' opinion was of extremely limited value in light of all the other evidence in the record on this point. The mere fact that an affidavit is filed does not mean that summary judgment cannot be granted.

The Court's reference to the lack of cross-examination may also have been an allusion to the exceptionally late filing of the affidavit. The Second Savin Motion for Summary Judgment was filed December 7, 1981. Affidavits, briefs, depositions, and hearings relevant to the motion resulted in an order by Judge Sanders dated January 24, 1984, which ruled on certain of Jayco's claims, granted leave for ten days to Jayco to supple-

ment the record with facts relating to unfair competition and trade defamation claim only and set a new hearing for February 16, 1984, for further oral arguments on certain claims, including antitrust claims (later reset to February 24, 1984, at Jayco's request). In violation of Judge Sanders' January 24, 1984 Order, Jayco filed two affidavits fourteen days later, a "Supplemental Response" on February 7, 1984, the Colleen Collins Affidavit on February 13, 1984, the Affidavit of Robert Mayes (cited in the Petition) on February 22, 1984, and the sixth Affidavit of Jim Woznick and another Affidavit of Jerry Andreff on February 23, 1984. On February 24, 1984, Jayco filed a 29 page "Final Supplemental Response" (with many attachments). Judge Sanders commented at the hearing in February on the unfairness of these late filings, including the Collins Affidavit.

The Colleen Collins Affidavit was filed one day before the date set for final summary judgment oral argument on the antitrust claims (and eleven days before the hearing finally took place after Jayco's requested postponement). That affidavit was filed after the discovery cut-off for the case and long after the summary judgment proof was to be completed (except that relating to unfair competition or trade defamation). Savin could not notice the deposition of Colleen Collins after the filing of her affidavit without violating court orders and there was not sufficient time in any event to do so before the final hearing. The Fifth Circuit comment on the Collins Affidavit was well-taken and both the trial court and the Court of Appeals gave the Collins Affidavit more consideration than it deserved since it should properly have been totally ignored and considered a nullity for its lateness.

Petitioner's most basic error is the attempt to defeat summary judgment by a narrow focus on a single affidavit, without viewing the affidavit in conjunction with the other facts in the summary judgment record. As this Court recently reaffirmed in

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475, U.S. , 106 S. Ct. , 89 L.Ed 2d 538, 552 (1986):

> Where the record *taken as a whole* could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *citing First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968) (emphasis added)

The totality of the evidence on financing as discussed above shows that Jayco was incapable and unwilling to acquire the necessary financing for a statewide bid.

(5) Jayco Lacked an Austin Office

A third prerequisite necessary to make a statewide bid, and one which Jayco did not have and made no attempt to acquire, was an Austin office. Jayco had only a Dallas office. A Fort Worth office that it opened closed shortly thereafter as a failure. There is nothing in the summary judgment proof indicating that Jayco ever took the slightest step preparatory to opening the Austin office and there is no indication that Jayco had the financial wherewithal or available bank financing to cover the substantial start-up costs which would be incurred in opening a new office in a distant county.

(6) Jayco did not have a Statewide Servicing Network

Since Jayco insists that it is suing based upon an alleged prospective statewide bid, Jayco would necessarily be required to demonstrate the ability to install machines on a statewide basis and service them. Such demonstration would be required as part of the bid procedure itself. Jayco was not prepared in this aspect of the bidding, however, as it made no attempt to contract with the various dealerships throughout the state for such servicing and installation arrangements. Indeed, when Jayco made its limited zone four bid in 1975, on the 300 series machines, Mr. Woznick admits that the other Savin dealers

declined to agree to service for him. Again, Jayco has failed to show the necessary preparedness to launch the expanded business venture upon which its antitrust claim is based.

(7) Jayco Never Submitted Any Bid in 1976 or Thereafter

Petitioner next complains of the Fifth Circuit's discussion or consideration of the fact that the Petitioner never submitted a bid on either (1) the statewide copier contract, (2) any "open market" contract, or (3) any supplies and paper contracts as probitive of the lack of causation between Savin's acts and Petitioner's failure to bid. Petitioner contends the Fifth Circuit was applying a "new Rule 56 standard" in even reviewing such damning evidence against Petitioner. In fact, the Fifth Circuit's review of such evidence was both proper and required, as noted by the Court in *Matsushita*, *supra.*, ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' ").

Petitioner tries to re-argue the evidence by alleging that its failure to bid for copier contracts was because Savin would not commit machines for Petitioner to sell. Petitioner cleverly ignores its additional failure to bid for copier *supply* contracts, which were unrelated to the copier rental contracts, and which failure highlights Petitioner's disinterest in entering any phase of the State of Texas copier business.

II. Self-Evident Defects in the Alleged Market Doomed Petitioner's Section 1 and 2 Claims

A. The Relevant Market and Savin's Market Power

Petitioner also complains of the rejection of its Sherman Act § 2 monopolization claims by the Fifth Circuit. As the Fifth Circuit opinion details, however, Jayco has totally failed to define the relevant product market, demonstrate by some proof

the propriety of the definition, and define a meaningful geographic market. 777 F.2d at 319-20.

In the deposition of one of Jayco's experts, Shelby Hunt, there is a reference to the "convenience copier market" but there is no attempt by Jayco to relate that to successful and unsuccessful Savin state bids, to explain why other photocopier sales or rentals should not be included, or demonstrate the share of the "convenience copier market" that Savin had at any time. The sole shred of evidence that Jayco offers is a magazine quote encompassing the claim that Savin placed machines with customers in portions of *1978-79* in excess of I.B.M. and Xerox. That is no evidence of Savin's market share of anything, particularly not in 1976.

Jayco also implies, but never seems to directly state, that the Savin photocopiers themselves are the relevant product market while referring to the "demise" of interbrand competition. As the Fifth Circuit noted, Jayco offers no proof or explanation as to why the products of Xerox, I.B.M., Canon, Saxon, Sharp, A.B. Dick, and the others mentioned in the record are not to be considered as part of the product market. Certainly, Shelby Hunt never makes such claim in his deposition. "Exceptional market conditions" are necessary for one brand to constitute the relevant product market when there are competing brands. *Sirdenstein v. National Medical Enterprises, Inc.*, 769 F.2d 1100, 1106 (5th Cir. 1985). Jayco has made no showing of exceptional market conditions.

The most glaring defect in Jayco's market allegations is its failure to delineate a rational geographic market. Before the Fifth Circuit it argued that a single purchaser, the State of Texas, should be considered the appropriate geographic market and cited *Grumman Corporation v. LTV Corporation*, 527 F. Supp. 86 (D.C. N.Y.), *aff'd*, 665 F.2d 10 (2nd Civ. 1981) and *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984), *cert. denied* 474 U.S. , 106 S. Ct. 788, 88 L. Ed.

2d 766 (1986). The Fifth Circuit rejected such reasoning and discussed the obvious inapplicability of *Grumman* and *Affiliated Capital*. 777 F.2d at 320. Other circuits have similarly rejected attempts to create a market out of a single purchaser. *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980); *Triple M. Roofing Corp. v. Tremco, Inc.* 753 F.2d 242, 1985-1 Trade Cases ¶ 66,382 (2nd Cir. 1985).

In its petition before this Court, Jayco has shifted position again and now asserts that it is really describing a market of many purchasers, the individual agencies, and not just a single purchaser, the State of Texas. The basis for this approach is that the agencies have considerable discretion in whether to place orders through the annual bidding winner or to go on "open market" bidding. In making such argument, Jayco undercuts its most basic premise — that winning the annual rental bid in June 1976 gave Savin a substantial competitive advantage and damaged Jayco.

Jayco's newly discovered market analysis still does not answer the basic problem highlighted by the Court of Appeals: there is no rational reason why other non-governmental purchasers and renters of photocopiers throughout Texas would not be part of the market. As the Fifth Circuit said, " . . . Jayco's exclusion from the market of all other purchasers within the state is completely arbitrary." 777 F.2d. at 320. Acceptance of Jayco's definition would "allow Jayco to assume what it must prove." *Id.*

The section 2 claims were appropriately dismissed and reversal of that determination is justified only if this Court desires "to clothe each and every sale with an antitrust suit." *Id.*

B. Petitioner's Section 1 Claims are under the Rule of Reason and Require Proof of Market Power

With respect to its Section 1 claims, petitioner's failure to define a relevant market also justified the granting of summary

judgment against it. The Fifth Circuit clearly affirmed Judge Sanders' holding that the restrictions, if they existed at all, were vertical. 777 F.2d at 315. As such they are tested under the rule of reason, which, in turn, requires proof of an adverse effect on a relevant market.

The Fifth Circuit held correctly that there was no evidence of a group boycott. 777 F.2d at 318 n. 41. This conclusion follows even more strongly in light of the Court's recent decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing*, 472 U.S. , 86 L. Ed. 202, 105 S. Ct. (1985), requiring proof that the entity from which the plaintiff is excluded had market power.

Petitioner argues that price fixing is *per se* illegal, but conveniently ignores the Fifth Circuit's ruling that petitioner simply lacks standing to assert any claims related to the alleged price fixing. 777 F.2d at 316.

CONCLUSION

Respondent respectfully prays that Petitioner's Petition for Writ of Certiorari be in all things denied.

Respectfully submitted

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85-1856

Supreme Court, U.S.
FILED
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CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAYCO SYSTEMS, INC.,

Petitioners,

v.

SAVIN BUSINESS MACHINES CORPORATION

Respondent.

EXHIBIT B
COURT OF APPEALS OPINION

JAYCO SYSTEMS, INC.,
Plaintiff-Appellant,

v.

SAVIN BUSINESS MACHINES CORPORATION,
Defendant-Appellee.

No. 84-1677.

United States Court of Appeals,
Fifth Circuit.

Nov. 29, 1985.

As independent dealer of photocopiers brought suit against a manufacturer alleging violations of federal antitrust laws. The United States District Court for the Northern District of Texas, Barefoot Sanders, J., granted summary judgment dismissing the antitrust claims, and the dealer appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) a photocopier dealer, which alleged injury to a business expansion it never achieved, lacked standing to

challenge a manufacturer's refusal to supply machines for a statewide bid where it failed to demonstrate the requisite preparedness to undertake a rental and servicing of statewide contracts, and (2) the dealer failed to establish that agreements dividing up territories for servicing and placement of copies between the manufacturer and its dealers violated the Sherman Act where the dealer failed to show a relevant market against which the manufacturer's market power and the anticompetitive effect of its practices could be judged.

Affirmed.

1. Monopolies 28(1.6)

A photocopier dealer, which alleged injury to a business expansion it never achieved, lacked standing to challenge a

manufacturer's refusal to supply machines for a statewide bid where it failed to deomonstrate the requisite preparedness to undertake a rental and servicing of statewide contracts. Clayton Act, § 4, 15 U.S.C.A. § 15.

2. **Monopolies** 28(1.6)

Since manufacturer's use of another independent dealer and an inside employee of the state to set its bid price did not injure the photocopier dealer, the dealer lacked standing to challenge the alleged price-fixing; furthermore, the dealer lacked standing to challenge a supply bid in which the manufacturer gave three dealers special discounts where the dealer did not bid and there was no evidence that the manufacturer prevented the dealer from bidding. Clayton Act, § 4, 15 U.S.C.A. § 15.

3. Monopolies 12(1.10)

Since every contract or business combination in some sense restrains trade, a rule of reason that examines the restraint's impact on competition is generally the arbiter of conduct alleged to violate § 1 of the Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. Monopolies 12(1.10)

Per se violations of § 1 of the Sherman Act are those which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

5. Monopolies 12(1.14)

Whether or not a combination or con-

spiracy falls under the per se rule often depends upon whether the restriction is implemented by a vertical or horizontal agreement; "horizontal agreements" affect interbrand competition and are generally illegal per se while "vertical agreements" generally affect intrabrand competition and are generally considered not so pernicious as to warrant per se treatment. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

See publication Words and Phrases for other judicial constructions and definitions.

6. Monopolies 17(1.3)

A photocopier dealer failed to establish that agreements dividing up territories for servicing and placement of copiers between the manufacturer and its dealers violated §§ 1 and 2 of the Sherman Act where the dealer

failed to show a relevant market against which the manufacturer's market power and the anticompetitive effect of its practices could be judged; the dealer's definition of the relevant geographic market as the texas state government copier business was too narrow since a single purchaser of a product cannot generally be considered a relevant market. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

7. Monopolies 12(1.3)

Offense of monopoly under § 2 of the Sherman Act has two elements: possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

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Carrington, Coleman, Solman, Johnson & Blumenthal, Corbet F. Bryant, Jr., Dallas, Tex., Schnader, Harrison, Segal & Lewis, Thomas A. Greene, New York City, for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, REAVLEY and GARWOOD, Circuit Judges.

GOLDBERG, Circuit Judge.

Like a rapidly growing tree in a commercial forest, plaintiff's original complaint in this case grew to sizable proportions in the six years it took to become a Fourth

Amended Complaint. What began as a collection of fraud and contract claims blossomed with the fertilizer of discovery into a cornucopia of antitrust claims as well. By compromise and settlement of the parties, the plaintiff's case has been pruned back to leave only the antitrust claims. After a thorough review of the record, we conclude that although the facts might provide another a fertile field to hoe, the plaintiff here is left without even a stump to stand on. We hope that we have not missed the forest for the trees.

Plaintiff Jayco Systems, Inc. ("Jayco") appeals from the district court's dismissal of its antitrust claims upon Defendant Savin Business Machines Corporation's ("Savin") motion for summary judgment. Savin is a prominent manufacturer of photocopying machines, and Jayco was a Dallas-based independent

dealer of Savin and other copying machines. The original dispute arose from Jayco's belief that Savin had fraudulently burdened Jayco's new dealership with the copying industry's version of the Edsel, and that Savin had breached a non-compete agreement. The antitrust claims arise from Savin's success in winning bids for the State of Texas copier business.[1]

Jayco maintains that Savin, through price-fixing, territorial allocations, refusals to deal, and a conspiracy with other dealers and state officials, acted to restrain trade in and monopolize the State of Texas photocopying market in violation of sections 1 and 2 of the Sherman Act. While

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[1]"State of Texas copier business" refers to the copying needs of the government of the State of Texas. We have adopted the language used by both parties.

these elements are present in a confusing potpourri, we find that some of them are, on the record before us, not violations, and that Jayco lacks standing to challenge the remainder.

We first set out the facts in the light most favorable to Jayco. We then narrow down the scope of our inquiry by finding that Jayco, to its misfortune, lacks standing to challenge those practices that, if a violation were found, would yield the greatest damages. Finding thereafter that those practices that Jayco has standing to challenge do not constitute per se violations of Section 1, we dispose of Jayco's Section 2 claim and its remaining Section 1 claims by finding that Jayco has failed to demonstrate a relevant market. Although Jayco points to uncontroverted damages of $9,510,824.00, we conclude that its damages amount to not even a fico.

I. FACTUAL BACKGROUND

This case comes before us on appeal from a summary judgment. The dismissal of antitrust cases on the basis of summary judgment is generally disfavored, as the claims often involve labyrinthine fact patterns and issues of intent and motive best left to the jury.[2] Nevertheless,

> we have recognized that a plaintiff may not immunize himself against the entry of summary judgment simply by alleging a violation of the antitrust laws. As in other types of cases, if the pleadings and accompanying evidentiary materials, when viewed in the light most favorable

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[2]See, e.g., Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1111 (5th Cir.1979), citing Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

> to the non-moving party, raise no "genuine issue as to any material fact," and it appears that the moving party is entitled to judgment as a matter of law, the court may properly enter judgment. Moreover, the party opposing summary judgment may not rely merely on the pleadings or even on conflicting testimony, but must introduce "significant evidence demonstrating the existence of a genuine fact issue."[3]

With these admonitions in mind, we now proceed to set out the facts in light most favorable to Jayco.

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[3] Walker v. U-Haul of Mississippi, 734 F.2d 1068, 1070-71 (5th Cir. 1984) (citations omitted).

Savin[4] is engaged in the nationwide marketing of copiers, their parts, and supplies. It sells at the retail level through branch offices and divisions which handle major or national accounts and placements with governmental agencies. It also sells to hundreds of authorized dealers, among which was Jayco, for resale or rental to end users. Dealers also act as commissioned agents for the provision of services to major accounts and government agencies that contract directly with Savin.

Jayco is a Texas corporation that was formed in 1974 by Jim and Shirley Woznick and their son-in-law, Jerry Andreff, for the pur-

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[4]Savin Business Machines Corporation was a New York corporation with its principal place of business in New York. It was merged into Savin Corporation, a Delaware corporation, which until 1983 had its principal place of business in New York, and thereafter in Connecticut.

pose of beginning a photocopier dealership in the Dallas area. In November-December, 1974, various written agreements were concluded between Jayco and Savin by which Jayco acquired assets of the Savin branch office in Dallas and became an authorized dealer of Savin equipment for a term of three years. Jayco also became a dealer of other copiers, including primarily those manufactured by Canon. After the three year authorized dealership for Savin products expired in late 1977, Savin notified Jayco in February, 1978, that it would not renew the dealership. Jayco and Savin have compromised and settled all claims arising from the dealership agreements. The settlement includes Jayco's release of any claim for wrongful termination.[5]

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[5]The relevant portion of the Settlement Agreement reads:

> There is reserved to Jayco the right to appeal (and all other rights emanating from such appeal as described below in

Prior to the introduction of a new model, business for both Savin and Jayco had been

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this paragraph) that portion of the Dismissal Order which granted summary judgment to Savin dismissing the claims set forth by Jayco in the Fourth Amended Complaint that (i) Savin monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act the sale and rental of photocopier machines and supplies to agencies of the State of Texas between May 1976 an August 31, 1981; and (ii) Savin engaged in an unlawful conspiracy in restraint of trade in violation of Section 1 of the Sherman Act with respect to the sale and rental by Savin of photocopier machines and supplies to agencies of the State of Texas between May 1976 and August 31, 1981. This exception does not encompass or preserve any claim, whether for alleged violation of state or federal anti-trust laws, for any alleged wrongful termination of Jayco's dealership, any alleged conspiracy or boycott relating in any way to sales or rentals in the Dallas-Fort Wroth area (other than sales and rentals expressly made to State of Texas agencies), any alleged refusal to deal not directly related to machines for State of Texas business, any alleged predatory pricing or price fixing not directly involving State of Texas business, or any alleged monopolization or attempt to monopolize other than directly involving State of Texas business.

poor. Dependent upon the Savin 300 series copier, which by all accounts was a dud of a machine, both sustained substantial losses.[6] Savin's engineers, however, unfazed by their lack of success with the 300 series, redeemed themselves with the 700 series in late 1975 and early 1976, when Savin began marketing these liquid toner copiers. The copiers were very successful, and Savin's advertisements later claimed that they outsold Xerox and IBM combined.[7] Savin's refusal to supply Jayco with the first model in the new series, the Model 750, for bids for the State of Texas copying business in 1976, forms the basis of Jayco's principal complaint.

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[6]Savin's financial statement showed a net loss for the 1974 fiscal year of $10,248,000. Jayco had losses of $11,000 in 1975 and also sustained losses in 1976.

[7]The only evidence, which is really no evidence at all, as to any market share, other than Savin's share of the State of Texas copier business, comes from the following exchange between Jayco's counsel

The State of Texas has an established competitive bidding program for the award of contracts to supply state agencies with photocopier equipment and supplies. In May-June of each year, the State solicits bids to satisfy its low, medium, and high volume copying requirements. The State is

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and Max Schultes, Savin's vice-president of copier development:

> Q: I have read some Savin advertisements and I may not be using the exact words, but are you aware of advertisements of Savin that have said that you are now outplacing Xerox and IBM combined?
> A: Yes, that's right, with numbers of machines, which is a different - if you go quantity of copies, it's a different ballgame.
> Q: But the number of machines?
> A: The number of machines we have placed.
> Q: The two combined?
> A: Yes, that's the advertisement.
> Q: Is it true?
> A: It's true. Data Quest came out with that. Depo. of Shultes, "Q" at 103. IBM and Xerox were not the only other players in the field. Other competitors included Canon, Saxon, Sharp, Royal and Minolta. Id at 105.

divided into several regional zones, and bidders may choose to compete for the whole state or any one of the zones. After submission of bids and a review and evaluation by the State Purchasing Commission, the Commission awards annual contracts beginning on September 1 for the rental of copiers in the various volume ranges. In late August-September of the same year, separate bids are entertained and contracts awarded for dispersant, toner, paper, and other supplies. During the course of the contract year, agencies also place "open market" orders for specific needs.

Although the bids for machines and supplies occur separately, a supply bid can make or break the earlier bid for the machines. While one company's bid on the machines may be lower than another's, the price of the copier is not the only factor.

Rather, bids are awarded on the basis of cost per copy, a figure that necessarily involves consideration of a copier's supply costs. While a bidder can rely on the list price of its supplies, it may be compelled to submit a more competitive supply bid in order to ensure the success of its copier bid.

Prior to Savin's refusal to supply its dealers with machines for state bidding, several independent dealers expressed interest in bidding the Model 750 for the State business in 1976. Jayco's Jerry Andreff, who had previously obtained a State contract while working for Saxon, another manufacturer of copiers, discussed the possibility of bidding the 750 with Art Nendick, a vice-president of Savin. Rec. at 962-63. Nendick, according to Andreff, originally expressed interest. Sometime in late 1975 or early 1976, however, Savin decided that it

alone would bid the Model 750 for the contract year beginning in September, 1976. Andreff, realizing that Savin machines would not be forthcoming, left Jayco in April 1976 and opened his own dealership in copiers other than Savin's.

Savin eventually bid the contract for the whole state, although as late as the night before the bid opening in June, Robert Mayes, an Austin dealer, still believed that he would be able to bid for the Austin zone. Savin disabused Mayes of this idea the following morning, but sweetened the bitter pill with a promise that his dealership, Modern Methods, would be granted a service fee for each machine installed under the State contract and given the right to bid toner and dispersant.

The parties dispute when Savin actually won the copier contract. The record, as far

as we can discover, does not contain the simplifying expedient of a letter from the State to Savin officially awarding the contract prior to the starting date of the contracts themselves on September 1. What is clear is that only after Savin refused to allow Jayco to bid on the copier contract, and after Savin itself bid in June, do clouds of conspiracy appear on the horizon and the plot begins to thicken.

Enter Mr. Trent Fowler, a state official in the auditor's office in Austin. Although he lacked responsibility for awarding the bids, he did have responsibilities that apparently allowed him to inspect all the bids. He makes his first appearance for our purposes the night before the bid opening in June at an outdoor restaurant in Austin named, forbodingly enough, Convict Hill. That night he met alone with Nendick to tell

him that Savin was not the low bidder, and that Savin would have to offer guarantees on the 750's drum life to keep the cost per copy down. Fowler also apparently told Nendick that Savin would have to rebid the toner and dispersant.[8]

There are two other meetings that form the basis of Jayco's claims, but the timing of them is not at all clear. One occurred in August of 1976 in Austin after Savin had bid $45 per case of toner and dispersant (called a "TD pack" in the trade). Several dealers, not including Jayco, were present. Robert Mayes recalls the meeting and his role in it:

> The apparent purpose of that meeting was for Savin and Mr. Fowler to explain to the dealers the manner in which the

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[8]Depo. of Henricksen, "XX" at 21-22.

State of Texas business would be administered, as well as to secretly coordinate a toner and dispersant bid plan by which some of the dealers would rebid Savin suplies in order to make the Savin contract the 'low bid' under the State's 'cost per copy' formula.

... Mr. Fowler ... informed me what the cost per copy had to be in order for Savin to be the low bidder and to be awarded the copier contract. I relayed this information to Savin, and the price at which toner and dispersant was to be jointly bid by the participating dealers was determined for us by Savin.

Aff. of Mayes, Rec. at 1538-39.

Because the price at which the three dealers were told to bid the TD packs would

not permit them a reasonable profit margin, Savin offered them the TD packs at a $9 discount. As Mayes recalls, the discount gave the three dealers "a nice price advantage over all other Savin dealers in [their] day-to-day business, as well as in connection with the State business." Id. at 1539. After Savin had offered Mayes and two other dealers the special discounts, "[a]ll three dealers, with the approval of Savin, agreed on territories [they] would serve and the price at which [they] would bid the toner and dispersant." Id. 1539-40. It seems apparent that without this bid by the three dealers, which was apparently made possible by inside information provided by Trent Fowler, Savin would not have won the contract.[9]

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[9]According to Mayes, Saxon would have won. Id. at 1538.

The other meeting took place in North Dallas sometime in the fall after Savin had won the bid. Dealers from Dallas, Austin, and Houston were present, and the subject was the allocation of responsibility for administering the Texas contract. Because Savin had limited capabilities of its own in Texas, it had to rely to a great extent on its independent dealers to service the contract. Thus, while Savin refused to let anyone but itself sell or rent its machines to the State, it still required its dealers for placement, installation, and servicing. Accordingly, at this meeting Savin and the dealers discussed the "servicing and the placement of any machines, and the sale of any machines off of that bid price, and the sale of all supplies associated with these machines."[10] Apparently, those present also

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[10]Deposition of Woznick, "DD" at 37-38.

discussed territorial allocations.[11] Mr. Woznick refused to participate, telling Nendick that Jayco then "had all [the busi-

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[11]During his deposition, the following exchange took place between Arthur Felcoff, the Savin branch manager in Dallas, and Jayco's counsel:

Q: Would you describe, for the record, the nature of the meeting and who was present?

A: There was a conflict as to which dealers would handle which State agencies. And in order to simplify things for the State and the corporation we met and discussed who would handle which accounts and came to an agremeent at that meeting.

Q: Was that in any way, sir, directed to the fact that independent dealers had been competing for the same State agency rental business?

A: That's correct.

* * * * * * *

Q: And would you tell us in what way and why there would be competition between the dealers in connection with the rental contract? Would you describe that for us?

A: The pricing was the same whether the branch offered it or whether the dealer offered it. And it became a question of which outlet the State agency felt more at ease with doing business.

Q: Would you tell me if there was anybody from Savin there that was kind of moderating the discussion?

* * * * * * *

A: Mr. Nendick was the moderator, the mediator between the dealers and the

ness] we could handle."[12]

In the following years, Savin's hold on the State's business strengthened, until in 1978, Savin held the contracts for all volume ranges up to 75,000 per month. After 1976, Savin apparently channeled all its bids through Unicopy, an independent dealership in Austin that had acquired Modern Methods. Bid prices for both the annual rental contracts and open-market

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branch on who would have the right to call on which State agencies.
Q: All right, sir. So at that time this meeting is it correct that you met with your competitors and you decided which one of the contracts each would call on.
* * * * * * *
A: That's a fair statement.
Q: All right, sir. And after meeting with the competitors and deciding the contracts that you would call upon, did that cease a lot of the problems that you were encountering with State contracts?
A: Yes.
Deposition of Felcoff, "FF" at 28-32. (emphasis added).

[12]Deposition of Woznick, "DD" at 38. Although he told Nendick that he had all the business he could handle, in his deposition Woznick offered the following reason

prices were determined jointly by Savin and Unicopy.[13] In her affidavit, Mary Wilson, the former Savin manager from 1980 for the State of Texas copier contracts, testified that Trent Fowler assisted Savin and Unicopy in formulating the bids.[14] Savin

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for his refusal: "Well, first of all, I don't think it's morally right for all competitors to gather to find out who's going to do what, nor do I feel it's legal dividing up a territory and dictating what prices are going to be quoted." Id.

[13]By affidavit Larry Stutes, formerly Savin's Director of Field Operations, Dealer Division, testified:

> The Savin Corporation submitted the State of Texas copier bids only after due discussion and evaluation with the Austin Savin dealer. After 1976, such communications were principally with Unicopy and Mr. Lawson [of Unicopy].... The independent Savin dealers were not allowed to compete with or bid against the coordinated efforts of Savin and Unicopy. The Savin Corporation had a practice, in fact, of not allowing such competition, and that practice was made evident to all of the various Savin dealers in the State of Texas.

Rec. at 1500-01.

[14]Aff. of Wilson, Rec. at 1416-17: "Mr. Trent Fowler's continuing contribution was to monitor the bidders, the prices bid against the Savin equipment, as well as

did not tolerate any competition from its other dealers, and it threatened to terminate any dealership that "rocked the boat."[15]

The record contains some evidence that Savin threatened to terminate dealers who bid non-Savin toner and dispersant competitively against Savin or its dealers. Savin also forbid dealers from buying toner and dispersant for Savin machines from manufacturers other than Savin.[16] A Savin employee policed dealers' inventory, looking for infractions of the rule against

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copier requisitions from the various State agencies, prior to the submission of such requests to vendors for bids. Mr. Fowler kept our office and Mr. Lawson informed of these matters in order that Savin might increase and successfully protect its State of Texas copier population."

[15]Depo. of Henricksen, "XX" at 31.

[16]Aff. of Mayes, Rec. at 1541-42.

dealing in competitors' products. Savin threatened those dealers with termination if they did not comply.[17]

Although there were isolated instances of rebellion against Savin's management of the State contracts, most dealers apparently refused to rock the boat. As Neil Henricksen, a Savin representative in Texas, relates, "We had a pretty sweet arrangement. Savin did at that time set up for everybody as far as compensation for the dealers, and they were handsomely paid, and it was pretty much felt with the kind of money they were getting, which was more than what they were due, that if they didn't cooperate they would be canceled."[18]

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[17]Aff. of Stutes, Rec. at 1501-02.

[18]Depo. of Henricksen, "XX" at 31-32.

In all of this, Jayco never bid any Model 750 copiers or supplies, for either rental or open market sale, nor did Jayco ever bid toner and dispersant, or, as had Mayes, any Non-Savin TD packs. In fact, Jayco had become an exclusive dealer of Savin products by May of 1976. Jayco did have, however, some experience in bidding for State business, but none of it was on the scale of the contract that Jayco claims it would have won. In 1975, it bid successfully on the sale of approximately sixty Canon copiers. This sale of approximately $200,000 required no financing. It also unsuccessfully bid Savin 300 copiers for a rental contract in one zone in 1975. Primarily because of the burden of carrying the Savin 300 copiers, Jayco's financial condition during the period of its dealership was weak, and it lost money

during its first three years of operation. In July, 1976, Woznick wrote Savin that, due to the continuing burden of monthly note payments on the 300 copiers and a non-compete note with Savin, Jayco was "not in a position to rent 750 copiers - even if we were able to obtain ample machines."[19]

Jayco argues that the sum of Savin's activities amounts to a successful attempt to monopolize the State of Texas copier business in violation of § 2 of the Sherman Act. Jayco also claims that Savin's road to monopoly was paved with violations of § 1. Jayco claims that Savin's refusal to supply Jayco with the machines it needed to make a state-wide bid was an unlawful refusal to deal, and that Savin's subsequent enlistment of its independent dealers to

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[19]Depo. of Woznick, "I", Def.Ex. No. 6.

service the contract gave rise to a group boycott. Jayco also claims that Savin's management of the State contracts indulged in unlawful territorial and customer allocations, that the use of Trent Fowler and Unicopy gave rise to unlawful price-fixing, and that the 1976 supply bid involved resale price maintenance.

II. STANDING

To bring a private, treble damage suit under the antitrust laws, a plaintiff must show that it has standing under § 4 of the Clayton Act, 15 U.S.C. § 15.[20] The plaintiff must show that it has suffered injury to its "business or property" of a type the antitrust laws were intended to prevent. See Brunswick Corp. v. Pueblo Bowl-O-Mat,

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[20] Reiter v. Sonotone Corp., 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). 15 U.S.C. § 15 reads, in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden

Inc., 429 U.S. 477, 487-88, 97 S.Ct. 690, 696-97, 50 L.Ed.2d 701 (1977); Hayes v. Solomon, 597 F.2d 958, 973 (5th Cir. 1979), cert. denied, 444 U.S. 1078, 100 S.Ct. 1028, 62 L.Ed.2d 761. Jayco claims that it suffered injury when Savin's refusal to allow it to bid competitively denied Jayco the profits from the state contract. We grant, and Savin does not dispute, that if

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in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained...." For a discussion of the differences between antitrust standing and constitutional standing, see D. Berger & R. Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809, 813 (1977).

In Nichols v. Mobile Board of Realtors, 675 F.2d 671, 675-76 (5th Cir.1982), we stated "Private antitrust liability ... requires the showing of (1) a violation of the antitrust laws, (2) the fact of damage, and (3) some indication of the amount of damage (citations omitted). The requirement of the 'fact of damage,' also called 'impact,' means that the antitrust violation must cause injury to the antitrust plaintiff."

a violation is shown, Jayco's injuries, if any, are an "antitrust injury." Pueblo Bowl-O-Mat, 429 U.S. at 488-89, 97 S.Ct. at 697.

Savin claims, and the district court agreed, however, that Jayco has not shown the requisite injury to its "business or property." Where a business expansion - as Jayco's venture into statewide bidding would have been - is contemplated, "[t]here must be a showing of intent to expand and of preparedness for the expansion." Martin v. Phillips Petroleum Company, 365 F.2d 629, 633 (5th cir. 1966); Hayes v. Solomon, 597 F.2d at 973. This rule denies recovery to those persons who, because the existence of their business was entirely speculative, could not have suffered injury in fact. While recognizing that the plaintiff need not show an injury to an ongoing business,

the rule serves to protect defendants from multiplicative recoveries.[21]

[1] Because Jayco alleges injury to a business expansion it never achieved, Jayco must demonstrate first that it intended to bid on the state contracts, and second, that it was prepared to bid on the contracts. Futhermore, Jayco must show a high likelihood that it would have won the competitive bid but for the alleged violations of the antitrust laws. Affiliated Capital Corporation v. City of Houston, 735 F.2d 1555, 1566 (5th cir. 1984) (en banc) petition for cert. filed, 53 U.S.L.W. 3509 (U.S. Dec. 14, 1984) (No. 84-951).[22]

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[21]This inquiry is to be distinguished from the question of assessing damages. If the plaintiff can show injury to business or property, difficulty in computing damages is no bar to standing. Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100, 123-25, 89 S.Ct. 1562, 1576-78, 23 L.Ed.2d 129; Bigelow v. RKO Radio Pictures, 327 U.S. 251, 164-65, 66 S.Ct. 574, 579-80, 90 L.Ed. 652 (1946).

[22]Affiliated involved Affiliated's attempt

Although the evidence is weak on the question of intent, we think it sufficient to create a genuine issue of material fact. Woznick had discussed, however briefly, a statewide bid with a Savin official, and Andreff, with his prior experience in bidding statewide contracts, clearly came

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to obtain Houston's cable TV franchise. A § 1 conspiracy frustrated the attempt. Although the court did not explicitly require a showing of success, its holding implicitly required a showing that Affiliated "would have obtained a franchise on the merits of its application." Id. Because Jayco never even submitted a bid, such a determination would be impossible in this case; we would require only that Jayco show a high likelihood of success.

However, because Jayco has failed to show its preparedness to bid, we do not consider whether Jayco had a high likelihood of success. We note that factors relevant to such a determination would be those used by the State Purchasing Commission at the time a bid would have been submitted. Thus, testimony from the officials that would have assessed plaintiff's qualifications would be essential.

to Jayco with the intent of expanding Jayco's business into statewide contracts. The district court concluded, however, and we agree, that Jayco failed to demonstrate the requisite preparedness to undertake the rental and servicing of statewide contracts.

The courts have looked to several factors in assessing a company's preparedness to expand. These factors include

> the ability of plaintiff to finance the business and to purchase the necessary facilities and equipment; the consumation of contracts by the plaintiff; affirmative action by plaintiff to enter the business; and the background and experience of plaintiff in the prospective business.

Martin, 365 F.2d at 634 (citations omitted). Because Savin's refusal to

supply machines is the gravamen of Jayco's complaint, the fact that Jayco could not have acquired the machines from Savin even had it satisfied all of the above elements is not dispositive. Rather, the question is whether, assuming Savin had been willing to supply Jayco with the necessary machines, Jayco would have been prepared to bid them.

As discussed below, Woznick's own statements and Jayco's failure to show that it could have financed the purchase of the machines convince us that Jayco lacked the preparedness to bid. This analysis, however, extends only to Jayco's planned expansion of its business into statewide bidding; it does not concern Jayco's standing to pursue relief for damages to its ongoing, normal course of business, which would have included the open market

rental or sale of copiers and supplies. However, for other reasons set out below, we find that Jayco also lacks standing to challenge Savin's alleged price-fixing violations and Savin's restraints on the bidding of supplies. We turn first to the question of Jayco's preparedness to bid in 1976.

In July, 1976, Woznick had written Savin that Jayco was "not in a position to rent 750 copiers - even if were able to obtain ample machines."[23] Later that summer when Savin met with its dealers to discuss the administration of the state contract, Woznick told Savin that Jayco had all the business it could handle.[24] Counsel's characterization of this latter statement

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[23]See note 19 supra.

[24]See note 12 supra.

as a "white lie" - designed apparently to prevent Woznick's having to disclose his embarrassing legal and moral objections to his business associate - does not rise to "significant evidence demonstrating the existence of a genuine fact issue." Woznick's earlier statement in his letter tends to support the conclusion that he later meant what he said. Moreover, the complete lack of any antitrust claims in Jayco's original complaint tends to belie Woznick's post hoc assertion that he found Savin's plans legally objectionable.

Jayco relies on the affidavit of Collene Collins, a former senior vice-president at Mercantile Dallas Bank, to demonstrate Jayco's financial preparedness to expand. Having stated that she had examined the creditworthiness of Jayco and the Woznicks and the profit history of the

state contracts, she concluded that "under these assumptions and circumstances I would have enjoyed the opportunity to have extended the necessary credit to Jayco Systems, Inc., and to have played some part in what would have been a very successful undertaking."[25]

Mindful of the admonition that the "mere possibility of financing being available in the abstract is not enough," Hayes v. Solomon, 597 F.2d at 975, we scrutinize Ms. Collins' affidavit carefully, note that her statements have not been subjected to the curative process of cross-examination, and find that her affidavit does not, in the face of Woznick's own declarations, rise to the level of a showing of "significant evidence

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[25]Rec. at 1531.

demonstrating the existence of a genuine fact issue" regarding preparedness.

First, there is no evidence that Ms. Collins considered the fact that the contracts did not guarantee the placement of copiers with the state agencies. Counsel conceded at oral argument that without adequate marketing of the machines after the bid, there was no guarantee that the machines could be placed.[26] Moreover, the contract permitted the return of machines on thirty days notice. Second, her conclusion that Jayco's and the Woznick's creditworthiness in 1976 was "excellent" indicates that she did not consider Jayco's repayment history with Canon or Savin, which had been described at the time only as "good" and "generally

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[26]Counsel for Jayco noted:

> In other words, if there was no marketing done, if there were no sales done, there could conceivably be no machines placed.

satisfactory."[27] Finally, the fact that Ms. Collins seems to have based her conclusion in part on the profitable history of the contract - information that would have been unavailable to any banker at the time and that rests in all probability on Savin's own efforts - taints her testimony.

In addition, at no time did anyone from Jayco approach anyone about financing the purchase of the necessary machines.[28] While this fact is not in itself dispositive - any efforts subsequent to Savin's refusal

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As a matter of practice though, rather than exception, most agencies would use whatever the contract machine was because there was supposed to be a competitive bid, and the agency should feel that the lowest available price for the particular product had been achieved through that bidding process.

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[27]Depo. of Bishop, "00," Ex. 22.

[28]The only occasion on which anyone from Jayco approached a banker regarding a loan occurred when Jerry Andreff attempted to borrow $86,000 for the purpose of acquiring

to deal would have been in vain, and efforts prior to its refusal would have been speculative - it buttresses our conclusion that Jayco has failed to show that it was able and prepared to obtain financing in 1976.[29] Jayco therefore lacks standing to challenge Savin's refusal to supply machines for a statewide bid.

[2] Because Savin's use of Unicopy and Trent Fowler to set its bid price did not injure Jayco, Jayco lacks standing to

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Jayco from Woznick. The banker declined the request because of the condition of the company. While the banker, of course, did not consider the application in light of a request to finance the purchase of copier machines for statewide bidding - which would have required initial financing of over $400,000 - we find it not insignificant that the condition of Jayco was insufficient to guarantee a loan of $86,000. Depo. of Bishop, "00".

[29]This case is remarkably similar to Martin v. Phillips Petroleum, where the court found that Martin, whose attempt to purchase a gas plant had been frustrated, had not been injured in his business within the meaning of 15 U.S.C. § 15. The court noted:

challenge this alleged price-fixing.[30] For the reasons set forth in Part IV below, we conclude that Jayco has failed to show that its exclusion from the State of Texas copier business violated the rule of reason. Because its exclusion was not unlawful, its position with regard to any subsequent price-fixing or bid rigging, if any, was no different than that of the average person on the street. Unlike a competing bidder or a defrauded purchaser, Jayco did not as a matter of law suffer any injury to its business or property.

> [W]e find that appellant by his own admission had no experience in the operation of a gas plant. He did not have the ability to finance the business, but was hoping to obtain 100% financing from the Bank. He made no investment in facilities or equipment. He had no contract with the bank.... Thus, it seems plain that Martin was unprepared to either enter the new business or to expand his existing business to include the gasoline plant purchase and operation.

365 F.2d at 634.

[30]Savin vigorously protests that Jayco released any claim of conspiracy involving

We turn next to Jayco's allegations regarding resale price maintenance. First, nothing in the record supports a finding of resale price maintenance in the sale or rental of copiers. Because Savin refused to allow any of its dealers to bid copiers to the State in the first place, Savin had no need to maintain resale prices.[31]

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state officials. The Compromise and Settlement Agreement reserved to Jayco the right to pursue its § 1 and § 2 claims as set forth in its Fourth Amended complaint. Savin points to the following language in the complaint - "Savin and its independent dealers ... entered into a combination, or conspiracy ...," - and argues that the omission of any explicit reference to state officials precludes Jayco from using their acts as the basis of a conspiracy. We disagree. Jayco need not name every conspirator when it pleads conspiracy. Moreover, after a review of the record, we doubt if the references to state officials caused Savin any undue surprise.

[31]Had Savin not refused to sell machines to its dealers and required that they bid not higher or lower than a predetermined price, this tale might have had a different ending.

The supply bid in 1976, in which Savin gave three dealers special discounts[32] presents a different problem. while Savin's requirement that three dealers bid the supplies at a set price arguably makes out a case of resale price maintenance, Jayco has no standing to challenge the violation because Jayco did not bid on supplies in 1976 and there is no evidence that Savin prevented Jayco from bidding for the 1976 supplies. Any injury from the alleged violation was therefore not Jayco's. The same can be said of Jayco's complaint that Savin prevented its dealers from selling other manufacturer's toner and dispersant. Jayco points to no instance where it

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[32]Any complaint regarding the discounts on supplies that Savin gave the three dealers is a claim under the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a. Jayco has released such claims.

attempted to bid a non-Savin TD pack. Jayco simply seeks here to recover for someone else's injury. Without injury, Jayco does not have standing.

III. PER SE OR RULE OF REASON?

[3] We are left therefore only with Jayco's claim that through territorial and customer divisions and a group boycott, Savin combined to restrain trade in the sale and rental of copiers in violation of § 1 of the Sherman Act.[33] Because every contract or business combination in some sense restrains trade, a rule of reason[34]

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[33]Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal...." 15 U.S.C. § 1.

[34]The most frequently cited statement of the rule is that of Justice Brandeis in Chicago Board of Trade v. U.S., 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918).

that examines the restraint's impact on competition has generally been the arbiter of conduct alleged to violate § 1. Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978).

[4] While the rule of reason requires the plaintiff to jump through several hoops and allows the defendant ample opportunity to wriggle off the hook, the courts, through long experience, have classified several categories of practices as illegal per se. Per se violations are those "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm

they have caused or the business excuse for their use." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977), quoting Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).

Price fixing,[35] resale price maintenance,[36] group boycotts,[37] tying arrangements,[38] and certain types of reciprocal dealing[39] have all received per

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[35] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

[36] Dr. Miles Medical Co. v. John D. Park & Sons, Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911).

[37] Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

[38] International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947).

[39] United States v. Griffith, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948).

se treatment. As we have previously recognized, "[t]he per se rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score. Properly applied, the per se rule is 'a valid and useful tool of antitrust enforcement.'" United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir.1980) (citation omitted).

[5] Whether or not a combination or conspiracy falls under the per se rule often depends upon whether the restriction is implemented by a vertical or horizontal agreement. See, e.g., Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1004 (5th Cir.1981) (first step of analysis is to determine whether alleged conspiracy is vertical or horizontal).[40]

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[40]"Vertical agreements are those among persons at different levels of the market structure - i.e., among a manufacturer and its distributors - in contra-distinction to horizontal agreements among competitors at

Horizontal agreements affect interbrand competition, and because interbrand competition is "the primary concern of antitrust law," they are generally illegal per se. Sylvania, 97 S.Ct at 2558 n. 19, 2561 n. 28. Vertical agreements, on the other hand, generally affect intrabrand competition. Because intrabrand competition can act as a check on intrabrand restrictions, Sylvania at 2588 n. 19, and because intrabrand restrictions in turn can increase interbrand competition in several ways, id. at 2560, vertical agreements are generally considered not so pernicious as to warrant per se treatment.

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the same level of the market structure - i.e., among manufacturers or distributors." Graphic Products Distributors v. Itek Corporation, 717 F.2d 1560, 1565 n. 3 (11th Cir.1983) (quoting ABA Antitrust Section Monograph No. 2 (1977)).

A notable exception to this general rule is resale price maintenance. United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); Greene v. General Foods Corporation, 517 F.2d 635 (5th Cir.1975), cert. denied, 424 U.S. 942, 96 S.Ct. 1409, 47 L.Ed.2d 348. Another exception is one where the supplier, although acting vertically, refuses to deal with or acts to terminate a customer at the behest of the customer's competitor. "[A]lthough the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer level." Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (3rd Cir. 1979); see also Abadir & Co. v. First Mississippi Corp., 651 F.2d 422, 427 n. 5 (5th Cir.1981); Red Diamond Supply, Inc. v. Liquid Carbonic

Corp., supra, 637 F.2d at 1004 n. 4 (5th cir.1981) (discussing the importance of the source - manufacturer or distributor - of the restraint).

[6] Against this background, nothing in the record suggests a conclusion other than that the agreements dividing up territories for servicing and placement of copiers between Savin and its dealers were vertical in nature and purpose. From 1976 to 1981, Savin steadfastly refused to permit any dealer but Unicopy to submit bids on the State copier contracts or open market sales. Even then, Unicopy appears to have acted only as Savin's agent for submitting bids. There is not the slightest hint that any part of Savin's scheme to distribute either copiers, service, or supplies originated as one or more dealers' attempt to injure a competitor.

Looking to Red Diamond Supply, Inc. v. Liquid Carbonic Corp., we need do no more than substitute "Savin" for "Liquid" to conclude: "Since the allegation here is that [Savin] imposed an agreement upon its distributors to abide by territorial and customer restrictions, that agreement is a vertical one, and the restrictions imposed are vertical restrictions." 637 F.2d at 1004. These restrictions are therefore measured against the rule of reason. A fortiori, Savin's threats to terminate any dealer that did not abide by that agreement - i.e., those dealers who "rocked the boat" - are also measured against the rule of reason. GTE Sylvania, supra.[41] We turn now to Jayco's § 1 claim under the rule of reason, and to its § 2 claim.

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[41]Jayco's half-hearted attempt to characterize Savin's refusal to deal as a group boycott and thereby bring it within the ambit of per se condemnation, Mendelovitz v. Adolph Coors Co., 693 F.2d 570, 577 (5th

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Cir.1972), is unavailing. Simply put, the facts do not support a finding of a group boycott. In fact, Jayco was offered the opportunity to participate in the service network, but declined to do so. As one commentator has observed, "boycott law deals with concerted efforts by traders at one level to keep others out or inhibit their competitive efforts at that level by making it more difficult for them to find what traders at that level need, usually suppliers or customers but sometimes access to transactions with other traders at the same level. When concerted conduct entails these elements, the boycott rule may have application." L. Sullivan, Antitrust § 83, at 232 (1977).

The only set of facts that might justify a preliminary finding of group boycott would be that where Unicopy, alone or with other dealers, conspired with Savin to deny Jayco copiers or supplies. See, e.g., Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) (department store conspired with wholesalers and manufacturers to deny competing store the goods it needed to do business). Because there is no evidence that any dealer influenced Savin's refusal to deal or that anybody other than Savin refused to deal with Jayco - and that refusal extended only to enforcing its customer restriction - this set of facts remains hypothetical.

[7] Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in relevant part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the States ... shall be deemed guilty of a felony." In United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), the court fleshed out the statute a bit and explained: "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Id. at 570-71, 86 S.Ct. at 1704, quoted in Aspen

Skiing Company v. Aspen Highlands Skiing Corporation, ___ U.S. ___, 105 S.Ct. 2847, 2854 n. 19, 86 L.Ed.2d 467 (1985).

These elements can be subdivided further, and the subelement of most importance to the disposition of Jayco's remaining claims is that involving the relevant market. This element is essential in both attempt and monopolization cases. Spectrofuge Corporation v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir.1978), cert denied, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499. "Because the relevant market provides the framework against which economic power can be measured, defining the product and geographic markets is a threshold requirement under § 2." Id. In addition, a showing of a relevant market is also necessary to assess anticompetitive effects

in rule of reason analysis under § 1. Sports Center, Inc. v. Riddell, Inc., 673 F.2d 786. 790-91 (5th Cir.1982); Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 295-91 (5th Cir.1981).

In Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962), the Court set out broad guidelines to help determine the product market or submarket, if any:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may

> be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Id. at 325, 82 S.Ct. at 1523-24 (citations omitted).

Jayco defines the relevant product market as "low and medium volume copiers." Other than Jayco's expert's reference to the "convenience copier market,"[42] there is no evidence in the record that would help us assess Jayco's definition against the Brown Shoe guidelines, nor is there any

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[42]Depo. of Hunt, "LL" at 79.

evidence in the record that would help us decide whether the product market should be limited to low and medium volume copiers or expanded to include high volume copiers as well.

Even assuming that such evidence, if offered, would have shown a low cross-elasticity of demand, i.e., a low degree of substitution between low and medium volume copiers on the one hand and high volume copiers on the other, Jayco has failed to show a relevant geographic market. While Jayco claims that the relevant geographic market is the Texas State government copier business, it has offered during the lengthy history of this case not a shred of evidence why the market should be so artificially limited to a single purchaser.[43]

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[43]While the question of relevant market is usually one of fact for the jury, the relevant market may in some instances be deter-

"While the relevant competitive market is not ordinarily susceptible to a metes and bounds definition," the Supreme Court has noted as a general proposition that it is the area in which the suppliers of a product "effectively compete." Tampa Electric Company v. Nashville Coal Company, 365 U.S. 320, 331-32, 81 S.Ct. 623, 630, 5 L.Ed.2d 580 (1961). The area of effective competition, as one commentator helps us conclude, is measured by the "ability of firms to sell beyond their immediate locations."[44] This ability is influenced by

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mined as a matter of law. Seidenstein v. National Medical Enterprises, Inc., 769 F.2d 1100, 1106 (5th Cir.1985). As the court in Seidenstein noted, "absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market." Id. Similarly, one purchaser in a market of competing purchasers cannot constitute a relevant geographic market, absent exceptional market conditions.

[44] 2 P. Areeda & D. Turner, Antitrust Law § 522, at 355 (1978).

such factors as transport costs, price relationships and actual sales patterns in the area, and buyer convenience and preferences.[45]

Even without an analysis of these factors, we can conclude that by choosing the state government contract business as the relevant market, Jayco has in effect conceded that its market definition is too narrow. If the state government, with its offices and agencies across the state, constitutes the relevant market, Jayco's exclusion from the market of all other purchasers within the state is completely arbitrary. Jayco asks us to limit arbitrarily the geographic market to a single purchaser, a limitation that, because of Savin's large share of the

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[45] See generally, id. §§ 522-525.

government's business, would allow Jayco to assume what it must prove. As a matter of common sense a single purchaser of a product cannot generally be considered a relevant market, lest we wish to clothe each and every sale with an antitrust suit.

Recognizing this, Jayco directs our attention to two cases in which governmental bodies have themselves formed the relevant markets. In Grumman Corporation v. LTV Corporation, 527 F.Supp. 86 (D.C.N.Y.) aff'd 665 F.2d 10 (2nd cir.1981), the district court found that the United States Government constituted the relevant market for the sales of carrier-based aircraft and equipment. This result rested largely on

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[46] We hazard the suggestion that a single purchaser could not be considered a relevant market unless plaintiff made some showing of the purchaser's monopoly power.

the fact that the United States was the sole purchaser of the military equipment involved.[47] By contrast, the Texas State government is but one of many users of copiers in Dallas, not to mention Texas or the United States in general. We find Grumman inapplicable to this case.

In Affiliated Capital Corporation v. City of Houston, 735 F.2d 1555 (5th Cir.1984) (en banc), this circuit found that an agreement among Houston businessmen to divide, with the blessing of the mayor, the city among themselves to ensure the receipt of cable television franchises constituted a conspiracy in violation of § 1 of the Sherman Act. As the dissent in that case points out, the court made no determination of the relevant market, so we

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[47] In arriving at a definition of the relevant product submarket, the district court in Grumman noted:

> The United States Government is the market concerned with production and

must assume that the relevant market was the City of Houston. To say this, however, provides no support for Jayco's argument in this case. Unlike the state government's position as merely one of many purchasers of copiers within the state, the City of Houston stood alone as the sole franchisor within its jurisdiction. Whatever further distinctions could be drawn between the city's role as franchisor and the state's role as purchaser, we think it sufficient to distinguish the case based on the City of Houston's unique position within a distinct geographic area.

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distribution of weapons systems for government military establishments. As such, this differs from the basic thrust of antitrust laws applicable to governmental procurement practices in competition with consumer enterprises buying goods generally available in the marketplace.

527 F.Supp. at 90, quoting Northrop v. McDonnell Douglas Corp., 498 F.Supp. 1112, 1123 (C.D. Cal.1980) (emphasis in original).

Because Jayco has failed to show a relevant market against which Savin's market power and the anticompetitive effects of its practices can be judged, we dismiss Jayco's § 2 claim and its remaining § 1 claims.[48]

IV. CONCLUSION

While Jayco has been nothing less than intrepid in its quest for the grail of treble damages, we find that its search like that of its medieval counterparts, has been in vain. Accordingly, we affirm the judgment of the district court.

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[48] If we assume that the whole state was the relevant market (something that Jayco has never even contended), Jayco has shown neither Savin's market power nor an anti-competitive effect on interbrand competition in either the copier or supplies product market. In fact, from reading Jayco's briefs, one gets the impression, unsupported by any meaningful data, that Savin was the only major supplier of copiers in Texas. While this might have been true, the record does not disclose to

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us the fate of IBM, Xerox, Canon, Saxon, A.B. Dick, Sharp, Minolta, and the other manufacturers. Jayco has the burden of proving anticompetitive effect, Red Diamond, 637 F.2d at 1007, and it has failed to carry it.